TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 14

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JACKSON, IN THE STATE OF KANSAS, ETC., PETITIONER,

vs.

THE UNITED STATES OF AMERICA, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 3, 1939.

CERTIORARI GRANTED APRIL 17, 1939.

SUPREME COURT OF THE UNITED STATES

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[fol. a] [Caption omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Law. No. 4135

UNITED STATES OF AMERICA (M-Ko-Quah-Wah, Allottee No. 193, an Incompetent Indian of the Prairie Band of Pottawatomi Indians), Plaintiff,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JACKSON, IN THE STATE OF KANSAS, a Body Politic and Quasi Public Corporation, Defendant

PETITION—Filed Dec. 23, 1936

The United States of America, by Summerfield S. Alexander, the United States Attorney for the District of Kansas, acting under the authority of the Attorney General of the United States, brings this action and, for its cause of action against the defendant, states:

1

At all times herein mentioned, one M-Ko-Quah-Wah was an allottee No. 193, and an incompetent Indian of the Prairie Band of the Pottawatomi Tribe. Her true post office address is Mayetta, Jackson County, Kansas. The defendant is a quasi public corporation, existing as a body politic under the laws of the State of Kansas. The plaintiff, the United States of America, is a corporate sovereign and body politic.

2

Heretofore and long prior to the year 1918 there was set aside for the use and benefit of such allottee, M-Ko-Quah-Wah, the following described real estate, lying and situated in Jackson County, Kansas, to-wit:

[fol. 2] The Northeast Quarter of Section Eleven (11), Township Eight (8) South, Range Fourteen (14) East of the Sixth P. M.

That under the treaties existing between the United States and such band of Indians, the land above described is not subject to taxation by the State and subdivision of the State, or municipal authorities, until such time as a trust relation between the United States and such band of Indians and the several allottees thereof should expire. That such trust relationship existed between the United States Government and such band of Indians and such allottees, from long prior to the year 1918 until the filing of this action, and such relationship continues to exist.

4

That on or about August 15, 1893, a trust patent was issued to M-Ko-Quah-Wah, Allottee No. 193 of such Prairie Band of Pottawatomi Indians, covering the above described land; that such patent specifically provided:

"Now, Know Ye, That the United States of America, in consideration of the premises and in accordance with the provisions of the fifth section of said Act of Congress of the 8th February, 1887, Hereby Declares that it does and will hold the land thus allotted (subject to all the restrictions and conditions contained in said fifth section) for the period of twenty-five years, in trust for the sole use and benefit of the said M-Ko-Quah-Wah or, in case of her decease, for the sole use of her heirs, according to the laws of the State or Territory where such land is located, and that at the expiration of said period, the United States will convey the same by patent to said Indian, or her heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, That the President of the United States may, in his discretion, extend the said period."

5

That before the expiration of the trust period specified in such patent which, by its terms, expired on August 15, 1918, a patent in fee was arbitrarily issued to M-Ko-Quah-Wah without her consent and without any application having been made by her for a patent, and on her express refusal to sign [fol. 3] application for a patent. That said patent, so arbitrarily issued, was dated April 17, 1918, Patent No. 625830, and on its face purported to convey the land in fee simple to the above allottee.

6

That on or about May 31, 1935, said fee simple patent No. 625830, so issued to such allottee No. 193 was cancelled, at the request of such patentee, under the authority of the Act of Congress approved February 26, 1927, 24 Stat. L. 1247; that such patent to such Indian was void and of no force or effect and was illegally issued in its inception.

7

That, as provided by the terms of the trust patent, above referred to, it was expressly provided that the President of the United States may, in his discretion, extend the trust period and, in pursuance to such provision of such trust patent and the provisions of law, on July 30, 1918, the President of the United States, did extend such trust provisions in the patent given to such allottee No. 193, for a period of ten years and thereafter and on April 16, 1928, the President of the United States, by executive order, further extended the trust period for an additional ten years.

8

That commencing with the year 1919 the defendant, the Board of County Commissioners of the County of Jackson, State of Kansas, illegally and wrongfully placed the above described real estate upon the tax rolls of Jackson County, Kansas, and thereafter there was illegally assessed and collected from the said M-Ko-Quah-Wah, certain taxes, and that the following statement correctly indicates, in the designated column, the number of tax receipt, the year such taxes were paid, the date paid, the amount of taxes paid, and interest at the rate of 6% from the date each of such items was paid to September 1, 1936. That, as shown by said statement, there was due to the plaintiff for taxes paid to and including the year 1933, the sum of Nineteen Hundred Sixty-six Dollars and Ninety-six cents ($1,966.96), and 6% interest thereon to September 1, 1936, from the date each item was paid in the sum of Eleven Hundred Six Dollars and Seventy-four Cents ($1,106.74), making a grand total [fol. 4] of Three Thousand Seventy-three Dollars and Seventy cents ($3,073.70). Said statement is as follows:

Total Amount of Taxes Paid by M-Ko-Quah-Wah, Potawatomi Allottee No. 193 for the NE/4 of Section 11, Town-

ship 8, Range 14, East 6th P. M. Kansas, containing 160 acres.

Official Receipts Nos.	Year of Taxes Paid	Date Paid	Amount Paid Actual Taxes	Interest at 6% to 9-1-36
5178	1919	9- 2-1920	$ 147.01	$ 136.80
5286	1920	12- 3-1920	80.24	62.00
5286	1920	6-20-1921	80.24	61.16
5363	1921	12-20-1921	76.73	64.01
5363	1921	6-20-1922	76.73	63.46
5201	1922	12-21-1922	64.11	49.92
5201	1922	6-20-1923	64.11	48.72
5459	1923	12-20-1923	64.25	47.68
5459	1923	6-20-1924	64.24	44.08
5323	1924	12-20-1924	62.08	47.76
5323	1924	6-15-1925	62.08	40.71
5403	1925	12-21-1925	67.23	43.38
5403	1925	6-20-1926	67.23	40.46
5523	1926	12-20-1926	68.07	38.42
5523	1926	6-18-1927	68.07	36.38
5462	1927	12-12-1927	68.90	34.42
5462	1927	6-20-1928	68.90	32.90
5373	1928	12-20-1928	70.62	31.15
5373	1928	6-20-1929	70.62	29.05
5415	1929	12-31-1929	69.41	26.25
5415	1929	6-26-1930	69.41	25.85
5656	1930	2- 5-1931	124.29	39.68
5213	1931	12-15-1931	123.47	33.21
5139	1932	1-17-1933	47.32	8.40
5139	1932	6-28-1933	47.32	8.40
2334	1933	2-12-1934	45.49	7.21
2334	1933	8-29-1934	48.79	5.28
			$1,966.96	$1,106.74

[fol. 5] 9

That each and every payment of taxes as indicated by said statement was illegally paid and received by the defendant, Jackson County, and that the defendant county is indebted to the plaintiff on each and every one of said items from the date they were respectively paid at the rate of 6% per annum until same is fully paid to the plaintiff, making a grand total due of Three Thousand Seventy-three Dollars and

Seventy Cents ($3,073.70), which sum should draw interest at the rate of 6% per annum from September 1, 1936, until paid.

10

Plaintiff further states that heretofore application was made to the defendant for a refund of such taxes and such application has been refused.

Wherefore, plaintiff prays for judgment against the defendant in the sum of Three Thousand Seventy-three Dollars and Seventy Cents ($3,073.70), together with 6% per annum interest thereon from September 1, 1936, until paid and for the cost of this action and all proper relief.

S. S. Alexander, United States Attorney, District of Kansas.

Duly sworn to by S. S. Alexander, jurat omitted in printing.

[fol. 6] IN UNITED STATES DISTRICT COURT

MOTION TO MAKE ADDITIONAL PARTIES—Filed March 1, 1937

Comes now the Defendant, The Board of County Commissioners of the County of Jackson, Kansas, and moves the Court for an Order directing that Lincoln Township in Jackson County, Kansas, and School District No. 97 in Lincoln Township in Jackson County, Kansas, and Mayetta Rural High School District No. 5 in Lincoln Township in Jackson County, Kansas, and the State of Kansas, be made party Defendants herein and directing that Summons issue herein to said additional parties as is provided by law, and as grounds for said Motion, this Defendant states: That Lincoln Township in Jackson County, Kansas, is now and has been at all times herein mentioned a duly organized Township in Jackson County, Kansas, whose officers are now as follows:

F. D. Cooney, Trustee.
Fred M. Baker, Clerk.
Lynn Keller, Treasurer.

That School District No. 97, is now and has been at all times herein mentioned a duly organized and existing School

District located in Lincoln Township in Jackson County, Kansas, whose officers are now the following persons:

John E. Walsh, Director.
Warner Coffin, Clerk.
C. B. Walker, Treasurer.

That Mayetta Rural High School District No. 5, is now and has been at all times herein mentioned, a duly organized [fol. 7] and existing Rural High School District located in Lincoln Township in Jackson County, Kansas, whose officers are now the following persons:

R. P. James, Director.
M. H. Lock, Clerk.
John E. Coleman, Treasurer.

That the State of Kansas is one of the States of the United States of America.

This Defendant further states that the action of the Plaintiff herein is one to recover Nineteen Hundred Sixty-six and 96/100 Dollars ($1,966.96) for taxes paid to the County Treasurer of Jackson County, Kansas, upon the

Northeast Quarter of Section Eleven (11), Township Eight (8), Range Fourteen (14), East 6th P. M., Jackson County, Kansas.

for the years 1919 to 1933 inclusive: That the above described real estate is located in Jackson County in the State of Kansas, in said Lincoln Township, and said School District No. 97, aforesaid, and Mayetta Rural High School District No. 5, aforesaid: That this Defendant collected said sum of Nineteen Hundred Sixty-six and 96/100 Dollars ($1,966.96), as taxes on said land aforesaid, during said period of time aforesaid, and out of said sum of $1,966.96, so collected by this Defendant as aforesaid, this Defendant collected for and disbursed to the State of Kansas $221.76, and collected for and disbursed to said Lincoln Township $371.39, and collected for and disbursed to said School District No. 97, $324.10, and collected for and disbursed to said Mayetta Rural High School District No. 5, $546.25. A true and correct itemized statement showing the date, and the amount of the taxes paid to this Defendant during the period of time aforesaid and showing the date and amount

thereof disbursed by this Defendant to the State of Kansas, Lincoln Township, said School District No. 97, and said Mayetta Rural High School District No. 5, is hereto attached, marked "Exhibit A," and made a part hereof.

This Defendant further states that if this Defendant is liable to the Plaintiff in this action for said taxes in any amount, the State of Kansas, Lincoln Township, and said School District No. 97, and said Mayetta Rural High School [fol. 8] District No. 5, are liable to the Plaintiff for the proportionate share of said tax that was received from this Defendant by said taxing districts, and by reason of the premises the said State of Kansas, and the said Lincoln Township, School District No. 97 and the said Mayetta Rural High School District No. 5, in Jackson County, Kansas, are necessary parties to a complete determination of settlement of the question involved in this action.

The Board of County Commissioners of the County of Jackson, Kansas, by Warden L. Noe, County Attorney of Jackson County, Kansas; Floyd W. Hobbs of Counsel.

Service of a copy of the above and foregoing motion is hereby acknowledged this 1st day of March, 1937.

S. S. Alexander, Attorney for Plaintiff.

Statement from Records of Jackson County, Kansas, as Applying to Northeast Quarter of Section 11, T 8 S, R 14, Jackson County, Kansas.

Year	Valuation	Tax Receipt No.	State of Kansas	Jackson County	Mayetta R.H.S. #5	School D. #97	Lincoln Township	Date Paid	Tax	Penalty	Total Tax and Penalty
1919	7,400.00	5178	12.95	33.52	22.20	37.00	27.75	9- 2-20	133.42	13.59	147.01
1920	8,680.00	5286 1sthf.						12- 3-20	80.24		80.24
		do.	12.15	48.36	43.40	23.42	32.55	6-20-21	80.24		80.24
1921	8,680.00	5363						12-20-21	76.73		76.73
		do.	19.40	32.07	43.40	26.04	32.55	6-20-22	76.73		76.73
1922	6,935.00	5201						12- 1-22	64.11		64.11
		5201	11.50	28.99	34.67	27.05	26.01	6-20-23	64.11		64.11
1923	6,935.00	5459						12-20-23	64.25		64.25
		5459	16.11	30.90	34.67	20.81	26.01	6-20-24	64.25		64.25
1924	6,935.00	5323						12-20-24	62.09		62.09
		5323	16.00	32.23	38.14	11.79	26.01	6-15-25	62.08		62.08
1925	6,935.00	5403						12-21-25	67.23		67.23
		5403	18.58	31.62	38.14	20.11	26.01	6-20-26	67.23		67.23
1926	6,960.00	5523						12-20-26	68.07		68.07
		5523	18.09	34.17	38.28	19.49	26.10	6-18-27	68.06		68.06
1927	6,960.00	5462						12-12-27	68.90		68.90
		5462	19.07	34.86	38.28	19.49	26.10	6-20-28	68.90		68.90
1928	6,960.00	5373						12-20-28	70.61		70.61
		5373	14.62	32.49	41.76	26.24	26.10	6-20-29	70.60		70.60
1929	6,960.00	5415						12-31-29	69.91		69.91
		5415	14.13	32.50	41.76	25.33	26.10	6-26-30	69.91		69.91
1930	6,440.00	5656						2- 5-31	124.29		124.29
			12.88	31.61	38.64	24.09	17.07				
1931	6,440.00	5213						12-15-31	123.97		123.97
			12.82	30.98	34.00	24.47	21.70				
1932	5,610.00	5139						1-17-33	47.07		47.07
	5,610.00	5139	11.11	26.81	30.85	5.72	19.64	6-28-33	47.06		47.06
1933	4,675.00	2334						2-12-34	45.49		45.49
		2334	12.35	25.82	28.06	13.05	11.69	8-29-34	45.48	1.51	46.99
1934 ff.	5,500.00	(taxes not paid)									
		Totals,	221.76	487.53	546.25	824.10	371.39		1,951.03	15.10	1,966.13

[fol. 10] IN UNITED STATES DISTRICT COURT

ORDER MAKING ADDITIONAL PARTIES DEFENDANT—Filed April 12, 1937

Now on the 12th day of April, 1937, the same being a regular day of the April, 1937, term of said Court, comes regularly on for hearing the motion of the Defendant, The Board of County Commissioners of Jackson County, Kansas, for an order directing that Lincoln Township in Jackson County, Kansas, and School District No. 97 in Jackson County, Kansas, and Mayetta Rural High School District No. 5 in Jackson County, Kansas, be made parties herein and for further order directing that summons be issued upon the said additional parties in the manner provided by law.

The Defendant, The Board of County Commissioners of Jackson County, Kansas, being present by its attorney, Warden L. Noe, and the Plaintiff being present by its attorney, Summerfield S. Alexander, and the Court being fully advised in the premises and after listening to the arguments of counsel, doth find that said motion should be granted and allowed as to Lincoln Township in Jackson County, Kansas; School District No. 97 in Jackson County, Kansas, and Mayetta Rural High School District No. 5 in Jackson County, Kansas.

It Is Therefore, By the Court, Considered, Ordered, Adjudged and Decreed, that Lincoln Township in Jackson County, Kansas, whose officers are now as follows:

F. D. Cooney, Trustee
Fred M. Baker, Clerk
Lynn Keller, Treasurer,

that School District No. 97, in Jackson County, Kansas, whose officers are now as follows:

John E. Walsh, Director
Warner Coffin, Clerk
C. B. Walker, Treasurer,

and that Mayetta Rural High School District No. 5, whose officers are now as follows:

R. P. James, Director
M. H. Lock, Clerk
John E. Coleman, Treasurer,

are necessary parties to a complete determination and settlement of the questions involved in this action, and it is the further order, judgment, and decree of the Court that the [fol. 11] Defendant cause summons to be issued to said additional parties Defendant in the manner provided by law, and it is the further order and judgment of the Court that the Defendant, The Board of County Commissioners of Jackson County, Kansas, be and hereby is granted thirty days from this date within which to plead. To all of which orders of the court sustaining motion of the defendant Board of County Commissioners to make additional parties defendant, the plaintiff in open court duly objected and exeepted, and its exceptions were allowed.

Richard J. Hopkins, District Judge.

O. K. S. S. Alexander, Attorney for Plaintiff. O. K. Warden I. Noe, Holton, Kansas; O. K. F. W. Hobbs, Holton, Kansas, Attorneys for Defendant.

In United States District Court

[Title omitted]

Order Granting Leave to Amend Petition by Interlineation—Filed October 15, 1937

On this 15th day of October, A. D. 1937, came on for hearing the application of the plaintiff to amend its petition by interlineation.

It Is Ordered:

That the plaintiff be, and is hereby, granted permission to amend the petition to show the description of the real estate therein as being in Township 8 instead of in Township 28.

Richard J. Hopkins, Judge.

O. K. S. S. Alexander, United States Attorney, District of Kansas.

[fol. 12] In United States District Court

Answer—Filed July 19, 1937

Come now the above-named defendants and for answer to the petition filed herein, deny each and every allegation in

said petition contained except as may be hereinafter specifically admitted.

Defendants admit all of the allegations of paragraph one of plaintiff's petition except that defendants deny that said M-Ko-Quah-Wah was an incompetent Indian at any of the times mentioned in said petition.

For further answer, said defendants allege that on or prior to 1919 the said Indian, M-Ko-Quah-Wah, was the owner in fee simple of the following described real estate in Jackson County, Kansas, to-wit:

The Northeast Quarter of Section Eleven (11), Township Twenty-eight (28) South, Range Fourteen (14) East of the Sixth Principal Meridian,

and has been the owner of said property ever since said time, and that during all of said times said land has been subject to taxation by the taxing bodies of Jackson County, Kansas.

Further answering, defendants allege that this action is barred by the three-year statute of limitations, as set out in G. S. 1935, 60-306, in paragraph two.

Further answering, defendants allege that this action is barred by the provisions of the cash basis law of the State of Kansas, as set out in G. S. 1935, 10-1101 to 10-1122, inclusive.

Wherefore, defendants pray that plaintiff take nothing by reason of this suit, and that defendants recover their costs herein expended, and have such other and further relief as to the court appears proper.

Warden L. Noe, Co. Atty., Jackson Co. Floyd W. Hobbs, J. L. Hunt, Attorneys for Defendants. Wheeler, Brewster & Hunt, of Counsel.

[fol. 13] IN UNITED STATES DISTRICT COURT

REPLY—Filed October 5, 1937

The plaintiff for reply to the Answer of the defendants, and each of them, specifically denies each and every statement, allegation and denial set forth in such Answer inconsistent with the allegations of the plaintiff's Petition.

Wherefore, plaintiff prays for judgment as in its Petition set forth.

S. S. Alexander, United States Attorney, District of Kansas.

Authority is hereby granted to file within Reply out of time.

Dated this 4th day of October, 1937.

Richard J. Hopkins, Judge.

IN UNITED STATES DISTRICT COURT

JOURNAL ENTRY OF JUDGMENT—Filed December 17, 1937

Be It Remembered, that on this 16th day of December, A. D. 1937, this matter came on for hearing and for trial at Kansas City, Kansas. The plaintiff appeared by Summerfield S. Alexander, United States Attorney for the District of Kansas, and the defendants appeared by Warden L. Noe, County Attorney of Jackson County, Kansas, Floyd Hobbs of Holton, Kansas, and Wheeler, Brewster and Hunt of Topeka, Kansas.

Thereupon the respective parties announced that they were ready for trial, and a qualified jury was duly empaneled and sworn to try said case, the trial of said case extending over and onto December 17, 1937.

The respective parties introduced their evidence and rested.

At the close of the evidence the plaintiff in open court filed motion requesting the court to direct the jury to return a verdict in favor of the plaintiff and against the defendant The Board of County Commissioners of the County of Jackson, in the State of Kansas, for the full amount of the taxes, penalty and interest at 6% per annum from the date the respective items of taxes were paid, and which motion the court took under advisement.

Be It Remembered, that on December 17, 1937, the court overruled the motion of the plaintiff for a directed verdict, [fols. 14-16] and to which ruling the plaintiff then and there in open court duly objected and excepted, and its exceptions were allowed. Thereupon the case was argued to the jury, and the court instructed the jury as to the law in the case.

Thereupon the jury retired for deliberation, and on the same day, namely, December 17, 1937, returned into court their verdict finding in favor of the plaintiff and against the defendant The Board of County Commissioners of the County of Jackson, State of Kansas, in the sum of Three Thousand Two Hundred Seventy-seven Dollars and Forty-nine Cents ($3,277.49).

Thereupon the plaintiff orally requested that judgment be rendered in favor of the plaintiff and against the defendant The Board of County Commissioners of the County of Jackson, State of Kansas, on the verdict of the jury.

It Is, Therefore, Ordered, Adjudged and Decreed by the Court, that the Plaintiff be and is hereby given judgment against the Board of County Commissioners of the County of Jackson, State of Kansas, in the sum of Three Thousand Two Hundred Seventy-seven Dollars and Forty-nine Cents ($3,277.49) as of this 17th day of December, A. D. 1937, together with interest on any unpaid balance thereof at the rate of 6% per annum from such date until the same is fully paid, and for the costs of this action, as well as all accruing costs.

And to which orders and judgments of the court the defendants in open court duly objected and excepted, and their exceptions were allowed.

Richard J. Hopkins, Judge.

O. K. John L. Hunt, Geo. M. Brewster, Attorneys for Defendants.

O. K. S. S. Alexander, United States Attorney for the District of Kansas, Attorney for Plaintiff.

[Motion for new trial was filed on December 18, 1937, and order of the court overruling the motion was filed March 25, 1938.]

[fol. 17] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL, WITH ORDER ALLOWING SAME—Filed March 14, 1938

To the Honorable Richard J. Hopkins, District Judge of the District Court of the United States for the District of Kansas:

The above-named defendants, The Board of County Commissioners of the County of Jackson, in the State of Kansas, a body politic and quasi public corporation, feeling themselves aggrieved by the verdict of the jury and judgment [fol. 18] entered thereon in the above-entitled action on the 17th day of December, 1937, do hereby appeal from said

verdict and judgment to the United States Circuit Court of Appeals, for the Tenth Circuit; that the errors upon which such appeal is based are contained in the assignment of errors filed herewith; and they pray that their appeal may be allowed and that a citation be issued in accordance with law and that a transcript of the record, proceedings and papers on which said judgment was entered, duly authenticated, be forwarded to the United States Circuit Court of Appeals for the Tenth Circuit, at Denver, Colorado.

And your petitioner desires that said appeal shall operate as a supersedeas, and therefore prays that an order be made fixing the amount of security which said defendants shall give and furnish upon such appeal, and that upon giving such security all further proceedings in this court be suspended and stayed until the determination of said appeal by the Circuit Court of Appeals.

Warden L. Noe, Floyd W. Hobbs, John L. Hunt, Geo. M. Brewster, Attorneys for Defendants.

Allowance of Appeal—Filed in the District Court March 15, 1938

The above appeal as prayed for is hereby allowed this 15th day of March, 1938.

Richard J. Hopkins, United States District Judge.

[File endorsement omitted.]

Due service and receipt of copy of the within and foregoing Petition for Appeal, with Order allowing the same, is hereby acknowledged this 15 day of March, 1938.

Homer Davis, Asst. United States Attorney, District of Kansas, Attorney for Plaintiff.

[fols. 19-20] In United States District Court

Assignment of Errors—Filed March 14, 1938

Came now the Board of County Commissioners of the County of Jackson, in the State of Kansas, a body politic and quasi public corporation, appellants in the above numbered and entitled cause, and in connection with and as a

part of their petition for appeal, assign the following errors which appellants aver occurred at the trial thereof and on which they rely to reverse the judgment as appears of record:

II

The District Court erred in refusing to give defendants' requested instruction No. 2, which was as follows:

"You are instructed that in no event is the plaintiff entitled to recover interest on any of the taxes paid. Therefore, if your verdict should be for the plaintiff you are instructed not to allow any interest."

To which refusal defendants properly excepted and the exception was by the court overruled.

[fol. 21]

VII

The District Court erred in refusing to give defendants' requested instruction No. 9, which was as follows:

"You are instructed that the Secretary of the Interior made an order that M-Ko-Quah-Wah was capable of managing her own affairs, which order has never been cancelled."

Said instruction, in connection with other instructions, was proper. To which refusal defendants properly excepted and exception was by the court overruled.

VIII

The District Court erred in instructing the jury that if the plaintiff was entitled to recover in the case, it had a right to recover all of the taxes, interest and penalties paid, together with interest thereon at the rate of six per cent per annum from the date of the respective payments to the date of the judgment in the case. To which instruction the defendants properly excepted and the exception was by the court overruled.

IX

The District Court erred in instructing the jury that M-Ko-Quah-Wah did not make an application for, or consent to, the issuance of a patent in fee covering the real estate

involved. To which instruction the defendants properly excepted and the exception was by the court overruled.

Wherefore, The Board of County Commissioners of the County of Jackson, in the State of Kansas, a body politic and quasi public corporation, pray that the judgment in said cause be reversed and that the cause be remanded with [fol. 22] instructions to the trial court as to further proceedings therein, and for such other and further relief as may be just in the premises.

Warden L. Noe, Floyd W. Hobbs, John L. Hunt, Geo. M. Brewster, Attorneys for Defendants.

March 15, 1938. Served on Homer Davis, Asst. U. S. Atty.

[fol. 23] IN UNITED STATES DISTRICT COURT

ORDER GRANTING LEAVE TO FILE AMENDMENTS TO ASSIGNMENT OF ERRORS—Filed May 11, 1938

Upon application of defendants, appellants in the above-entitled cause, and for good cause shown, it is hereby

Ordered, That the defendants, appellants in the above-entitled cause, be and they are hereby granted the right to amend the assignment of errors filed herein, and said defendants are granted fifteen days in which to file said amendments to the assignment of errors.

Dated this 11th day of May, 1938.

Richard J. Hopkins, District Judge.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S AMENDMENTS TO ASSIGNMENT OF ERRORS—Filed May 23, 1938

Comes now The Board of County Commissioners of the County of Jackson, in the State of Kansas, a body politic and quasi public corporation, appellant in the above numbered and entitled cause, and in connection with and as a part of its petition for appeal, and in accordance with the order of this court dated May 11, 1938, does hereby file and designate the following amendments to the assignment of errors herein filed.

2. Paragraph VIII of said assignment of errors is hereby amended by inserting before the last sentence thereof the

language of the instructions given by the court as follows, to-wit:

"'If the plaintiff has a right to recover in this case, then it has the right to recover all taxes, interests and penalties paid by M-Ko-Quah-Wah and by her husband and by the First National Bank of Mayetta, Kansas, or any agent or officer of such bank, if paid on behalf of the said M-Ko-Quah-Wah, together with interest thereon at the rate of six per cent per annum from the date of the respective payment until the date of your verdict in this case.'

[fol. 24] for the reason that the same is in violation of law and of the Ninth and Tenth Amendments to the Constitution of the United States."

3. Paragraph IX of said assignment of errors *if* hereby amended by inserting before the last sentence of said assignment of errors the language of the instructions given by the court as follows, to-wit:

"I think the facts show, without any question, that said M-Ko-Quah-Wah did not make an application for, or consent to the issuance of a patent in fee covering the above described real estate."

5. Said assignment of errors is further amended by adding thereto a paragraph XIII as follows, to-wit:

"XIII

The district court erred in instructing the jury as follows:

'The fact that the First National Bank of Mayetta, Kansas, or some officer or agent of such bank may have recorded the patent in fee, does not of itself show that the Indian, M-Ko-Quah-Wah, consented to have the land involved placed upon and taxed by the county authorities of Jackson County, nor does the fact that the Indian, M-Ko-Quah-Wah, or her husband or someone in her behalf has paid the taxes to the County Treasurer of the defendant [fol. 25] Jackson County, establish of itself that such taxes were paid voluntarily,'

to which instruction the defendants properly excepted and the exception was by the court overruled."

6. Said assignment of errors is further amended by adding thereto a paragraph numbered XIV as follows, to-wit:

"XIV

The district court erred in instructing the jury as follows:

'If the taxes paid by M-Ko-Quah-Wah were paid through a well founded apprehension that if she did not pay them, she would be compelled to pay a large amount of interest and penalties and eventually lose her land by a tax deed, then that payment under such circumstances would not be a voluntary payment. It is not necessary that the taxes should have been paid under protest in order to entitle the plaintiff to recover in this case. To constitute a voluntary payment of taxes, the party must have paid them with knowledge of her rights and paid them with a desire to pay them and not because of fear and apprehension of losing the land and of incurring interest and penalties if they were not so paid.'

to which instruction the defendants properly excepted and the exception was by the court overruled."

Wherefore, The Board of County Commissioners of the County of Jackson, in the State of Kansas, a body politic and quasi public corporation prays as in the original assignment of errors it has prayed.

Warden L. Noe, Floyd W. Hobbs, John L. Hunt, Geo. M. Brewster, Attorneys for Defendant.

[fol. 26] [Bond on appeal in the sum of $4,000, with appellant as principal and United States Fidelity and Guaranty Company of Baltimore, Maryland, as surety, approved by Richard J. Hopkins, District Judge, was filed June 9, 1938.]

[Citation, dated March 17, 1938, with acceptance of service by counsel for appellee, was filed in the District Court on March 19, 1938.]

IN UNITED STATES DISTRICT COURT

Bill of Exceptions

Be It Remembered, That on the 16th day of December, 1937, at the December 1937 term of the District Court of the United States for the District of Kansas, First Division, the above-entitled cause came on for trial.

Thereafter, a jury was impaneled and sworn, and the trial commenced on the 16th day of December, 1937, S. S. Alexander, United States District Attorney for the District of Kansas, and Homer Davis, Assistant United States District Attorney for the District of Kansas, appearing for plaintiff, and Warden L. Noe, County Attorney of Jackson County, Kansas, Floyd W. Hobbs, of Holton, Kansas, and Wheeler, Brewster & Hunt by John L. Hunt and George M. Brewster appearing for defendants.

Whereupon, plaintiff to sustain the issues on its part called H. E. BRUCE as a witness in plaintiff's behalf, and said H. E. Bruce testified as follows:

Direct examination:

My name is H. E. Bruce. I live at Mayetta, in Jackson County, Kansas. I am superintendent of the Indian Agency at that place. It is known as the Pottawatomie Indian [fol. 27] Ageney. I know M-Ko-Quah-Wah in connection with this agency. I have known her since I first became connected with the agency. She is in the courtroom. (Indicating.) Her name is on the rolls of the Pottawatomie Tribe of Indians. These Pottawatomie Indians that I refer to are usually called the Prairie Band of Pottawatomie Indians to identify them from other groups of the Pottawatomie Tribe in other sections of the country.

Thereupon, plaintiff introduced in evidence the following exhibits:

PLAINTIFF'S EXHIBIT 1

Plaintiff's Exhibit 1 includes the allotment rolls certified under date of May 31, 1893, of the Pottawatomie Indians showing that M-Ko-Quah-Wah is Allottee No. 193; that she is a female thirty-two years of age; that the description

of the land is the NE¼ Section 11, Township 8, Range 14, 160 acres. Under the column marked "Remarks" she is designated as mother.

Plaintiff's Exhibit 1 also contains the following instrument:

(Trust Patent)

"The United States of America, To All To Whom These Presents Shall Come, Greeting:

Whereas, There has been deposited in the General Land Office of the United States a schedule of allotments of land, dated May 31, 1893, from the Acting Commissioner of Indian Affairs, approved by the Acting Secretary of the Interior June 2, 1893, whereby it appears that under the provisions of the Act of Congress approved February 8, 1887, (24 Stat. 388,) as amended by the Act of Congress of February 28, 1891, (26 Stats. 794) M-ko-quah-wah, an Indian of the Prairie band of Pottawatomies, has, been allotted the following-described land, viz.:

The northeast quarter of section eleven in Township eight South of Range fourteen east of the Sixth Principal Meridian in the State of Kansas, containing one hundred and sixty acres.

(Stamped thereon is the following: Fee Patent Issued: Letter No. 765362-18, Patent No. 625830. Fee Pat. #625830 Cancelled Under Act Feb. 26, 1927. See Sec. Letter 1605474. CCW 6-22-35.)

[fol. 28] Now, Know Ye, That the United States of America, in consideration of the premises and in accordance with the provisions of the fifth section of said Act of Congress of the 8th February, 1887, Hereby Declares that it does and will hold the land thus allotted (subject to all the restrictions and conditions contained in said fifth section) for the period of twenty-five years, in trust for the sole use and benefit of the said M-Ko-Quah-Wah, or, in case of her decease, for the sole use of her heirs, according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or her heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, That the President of the United States may, in his discretion, extend the said period.

In Testimony Whereof, I, Grover Cleveland, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, this fifteenth day of August, in the year of our Lord one thousand eight hundred and ninety-three, and of the independence of the United States the one hundred and eighteenth.

By the President:

Grover Cleveland, by E. Macfarland, Ass't Secretary. L. O. C. Lamar, Recorder of the General Land Office." (L. S. "L. O.")

Plaintiff's Exhibit 1 also contains two Executive Orders, which are as follows:

"It is hereby ordered, under authority contained in the act of February 8, 1887 (24 Stat. 388-389), that the trust period on the allotments of the Prairie Band of Potawatomi Indians in Kansas, which trust period expires during the calendar year 1918, be, and is hereby extended for a period of ten years, with the exception of the following: (Exceptions do not cover land in question).

Woodrow Wilson.

The White House, 30 July, 1918.
(WWL)"

[fol. 29] "Executive Order

It is hereby ordered under authority contained in the act of February 8, 1887, (24 Stat. 388-89), that the trust period on the allotments of the Prairie Band of Pottawatomi Indians in Kansas, which trust period expires during the calendar year 1928, be and is hereby extended for a period of ten years, with the exception of the following: (Exceptions do not cover land in question).

Calvin Coolidge.

The White House, April 16, 1928 (No. 4858)."

Plaintiff's Exhibit 1 also contains the following Patent in Fee Report and Report of the Competency Commission:

"Patent in Fee Report

Name of Allottee M-Ko-Quah-Wah, Potawatomi Ks. Agency, Age 50 Degree of blood Full Indian. Married or

single Married, Allotment No. 193. Description NE/4 of Sec. 11, Twp. 8, Rge. 14, East of the 6th P. M. in Kansas. Area 160. Value by allottee $3000.

Allotment was made under the act approved Feb. 28, 1891. (26 Stat. L., 794).

The trust period on this allotment expires August 15, 1918.

I hereby make application for a patent in fee covering the above-described land.

.....

Witnesses to signature:

.....

.....

Pottawatomi Agency, Kansas, Dec. 29, 1917.

The Secretary of the Interior, Washington, D. C.

SIR:

We have the honor to report This 160 is pasture land, but the applicant and her husband have a well improved home on a deceased child's allotment. They have a fine house, a large barn, wells, windmills, concrete hog house and all other necessary farm buildings. The husband has an automobile, ten or fifteen head of horses and mules, a large herd of cattle including a bunch of fine thoroughbred Galloways. They are considered very competent people. [fol. 30] This allottee declined to sign an application, but is deemed to be fully competent to transact his own business without further Government supervision.

Julian H. Fleming. J. R. Wise.

Office of Indian Affairs

Washington, Feb. 7, 1918.

Respectfully forwarded to the Secretary of the Interior, with the recommendation that the Commissioner of the General Land Office be directed to issue a patent in fee to M-Ko-Quah-Wah, for the land above described, and that the issuance of this patent be made special. When issued it should be sent to this Office for delivery.

C. F. Hauke, Chief Clerk.

General Land Office

Washington, Feb. 11, 1918.

elv

There are no reservations or withdrawals covering the land hereinbefore described, and there are no reasons appearing in the records of the General Land Office why patent in fee should not be issued as recommended.

(Signed) C. M. Bruce, Assistant Commissioner.

Department of the Interior

Washington, Feb. 13, 1918.

It appears from the evidence submitted that M-Ko-quah-wah is competent to care for her own affairs in a degree that entitles her to a patent in fee covering the land described in her petition, and I therefore direct the Commissioner of the General Land Office to issue a patent in fee to her for the NE¼ of Sec. 11, T. 8 S., R. 14 East of 6 P. M., in Kansas, and that the issuance of this patent be made special.

S. G. Hopkins, Assistant Secretary."

Exhibit 1 also contains the fee patent recommended by the Competency Commission, which fee patent reads as follows:

[fol. 31] "Fee Patent Recommended by Competency Commission

4-1060

765362
7930-18 I. O.
193

The United States of America, To all to whom these presents shall come, Greeting:

Whereas, an Order of the Secretary of the Interior has been deposited in the General Land Office, directing that a fee simple patent issue to the claimant M-Ko-quah-wah, a Pottawatomie Indian, for the northeast quarter of Section Eleven in Township eight south of Range fourteen east of

the Sixth Principal Meridian, Kansas, containing one hundred sixty acres:

Cancelled by Order Dated May 31, 1935. Office of Indian Affairs. Received May 8, 1935. 24756.

Now know ye, That the United States of America, in consideration of the premises, Has Given and Granted, and by these presents Does Give and Grant, unto the said claimant and to the heirs of the said claimant the Land above described: To Have and to Hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said claimant and to the heirs and assigns of the said claimant, forever.

In Testimony Whereof, I, Woodrow Wilson, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, the Seventeenth day of April, in the year of our Lord One thousand nine hundred and Eighteen and of the Independence of the United States the one hundred and forty-second.

By the President:

Woodrow Wilson, by M. P. Leroy, Secretary. L. T. C. Lamar, Recorder of the General Land Office. (Seal.)

Recorded: Patent Number 625830."

[fol. 32] On the reverse side of the fee patent appears the following:

"Entered in the Transfer Record, in my office this 7th day of April, 1930.

Fee 10c.

C. F. Hurni, Co. Clerk.

STATE OF KANSAS,
Jackson County, ss:

This instrument was filed for record on the 7th day of April, A. D. 1930, at 8:55 o'Clock A. M., and duly recorded in Book 68 on page 557. Fee $1.10 Pd.

Ella Teer, Register of Deeds.

1st Nat'l Bk. Mayetta.
Original Compared with Record."

Plaintiff's Exhibit 1 also contains the following letter:

Address Only the Commissioner of Indian Affairs

"Refer in Reply to the Following:

United States Department of the Interior, Office of Indian Affairs

Washington, May 20, 1935.

The Honorable The Secretary of the Interior.

My Dear Mr. Secretary:

On April 17, 1918, fee patent No. 625830 was issued to M-ko-quah-wah, Potawatomi Indian, No. 193, for her allotment described as the NE¼ of Sec. 11, Twp. 8 S., R. 14 E. 6th P. M., Kansas, containing 160 acres. The above fee patent was issued during the trust period without application by or consent of the allottee.

The records disclose that the patent was issued pursuant to the recommendation of the so-called competency commission, although the allottee declined to sign an application. The patentee now requests that the patent be cancelled and has submitted an abstract of title showing that the land has never been sold or mortgaged; and it is now clear and unencumbered except for taxes.

It is recommended that the fee patent be cancelled under authority of the act of Congress of February 26, 1927 (24 Stat. L., 1247).

Sincerely yours, John Collier, Commissioner.

[fol. 33] Department of the Interior, Office of the Secretary

Approved, May 31, 1935. by: Oscar L. Chapman, Assistant Secretary, and the papers returned to the Indian Office. Enclosure 647885"

Exhibit 1 also contains an order cancelling the fee simple patent, which is as follows:

"United States Department of the Interior, Office of the Secretary

21316-35. Washington, May 31, 1935.

Order Cancelling Fee Simple Patent

Whereas, on April 17, 1918, fee simple patent No. 625830 was issued to M-ko-quah-wah, Potawatomi Indian, No. 193,

for her allotment described as the N. E. ¼ of Sec. 11, Twp. 8 S., R. 14 E. 6th P. M., Kansas, containing 160 acres; and

Whereas, said fee simple patent was issued during the original trust period covering said allotment without application by or consent of the said M-ko-quah-wah for a fee simple patent:

Now, Therefore, acting under the authority conferred on me by the act of Congress of February 26, 1927 (24 Stat. L. 1247), I hereby cancel said fee simple patent covering the above described lands, and declare that pursuant to the terms of said statute, said lands have the same status as though such fee simple patent had never been issued; and the commissioner of the General Land Office is hereby directed to make appropriate notation and entry hereof on the records of his Office.

Oscar L. Chapman, Assistant Secretary."

AGREEMENT AS TO AMOUNT OF TAXES AND INTEREST PAID AND STATUS OF RECORD

It was agreed by counsel for both parties that the total amount of taxes paid on the land in question during the period of time between the issuance of the fee simple patent and its cancellation was $1,966.13. It was further agreed by the counsel for both parties that interest at six per cent per annum on the item of taxes and penalties paid to December 6, 1937, amount to $1,311.36. The following occurred with reference to the agreement as to the above amounts:

[fol. 34] "Mr. Brewster: * * * We object to the introduction of that evidence or any showing as to the amount of interest on the ground and for the reason that the same is incompetent, irrelevant and immaterial.

The Court: All right, that will be received.

Mr. Brewster: That is not all my objection.

The Court: All right.

Mr. Brewster (continuing): And that plaintiff is not entitled to interest, but if competent, relevant and material then the fact is as stated.

The Court: Yes, all right, I admit it.

Mr. Brewster: To which we except." (S. Tr. 17-18):

It was further agreed by and between the parties that the records in the office of the Register of Deeds of Jackson County, Kansas, do not show any mortgages or deeds as having been given on the property involved by M-Ko-Quah-Wah.

PLAINTIFF'S EXHIBIT 3

Plaintiff's Exhibit 3 consists of the tax receipts issued covering the land in controversy. Said tax receipts show the following information:

Number	Date of Receipt	Received of	Year
5178	9- 2-20	M-Ko-*Wah-Quah*	1919
5286	12- 3-20	Andrew Wabaunsee	1920
5363	12-20-21	Andrew Wabaunsee	1921
5201	12- 1-22	Andrew Wabaunsee	1922
5459	12-20-23	Andrew Wabaunsee	1923
5323	12-20-24	Andrew Wabaunsee	1924
5403	12-21-25	Andrew Wabaunsee	1925
5523	12-20-26	Andrew Wabaunsee	1926
5462	12-12-27	Andrew Wabaunsee	1927
5373	12-20-28	Andrew Wabaunsee	1928
5415	12-31-29	Andrew Wabaunsee	1929
5656	2- 5-31	Andrew Wabaunsee	1930
5213	12-15-31	M-ko-quah-wah	1931
5139	1-17-33	M-quo-quah-wah	1932
2334	2-12-34	Mrs. Andrew Wabaunsee	1933

[fol. 35] Tax Receipt 5373 has written thereon the following:

"Pd. under protest-acc't School Levy Dist. #97."

M-Ko-Quah-Wah Witness for Plaintiff

Thereupon, plaintiff called M-Ko-QUAH-WAH as a witness in its behalf, and said M-Ko-Quah-Wah testified through an interpreter as follows:

Direct Examination:

My name is M-Ko-Quah Wah. I live in Mayetta, Kansas. I have lived there forty-five years on this land in

question. I am a full blood Potawatomi Indian. I know of a competency commission having been appointed in connection with Indian lands of the Potawatomi Reservation. Andrew Wabaunsee was my husband. We were married about fifty-five years ago. My husband and I lived on this land from about forty-five years ago all down through the years.

I talked with my husband concerning the payment of taxes about twenty years or more ago. When I received my patent I wanted to know what to do about this patent and the payment of the taxes. At that time I requested my husband to send that patent back to Washington. After that conversation I told him to go ahead and pay the taxes. I advised my husband to go ahead and pay the taxes for fear that if we didn't, we would lose the land. I had another talk with my husband about two years after I received the patent. During that conversation I asked my husband and one of the daughters what she would do regarding these taxes on the land. When the daughter would come to my place I wanted to know what to do about paying the taxes. I was yet weary regarding the payment of taxes.

My husband did the business for me. While my husband was able to work he farmed the land himself. After he became disabled, he hired the farming work done. We took in stock for pasture during the years 1918, 1919 and on up to the early part of the 20's. We took in more than forty head of stock outside of our own stock for pasture. We received $1.50 per head per month for these large cattle and $1.00 per head per month for yearlings and young stuff. This number of stock was substantially taken in for 1918 and subsequent years. My husband, Andrew Wabaunsee, [fol. 36] received the money for the stock pastured. My husband looked after the business with reference to collecting rentals and renting the land during those years. I never collected the rents for the pasture myself. I requested my husband to look after the business for me and collecting the rents was part of the work that he was to do.

(Here ensued an argument with reference to what the tax receipts showed. The following occurred:

The Court: Don't these tax receipts show the taxes paid by her? Mr. Alexander: No by the husband, all but three or four.

The Court: Part of them show paid by her.

Mr. Alexander: Three or four, the majority is in the husband's name, yes. (Tr. 20-21).

M-Ko-Quah-Wah continued as follows:

I do not sign my name. My husband died about eight years ago. I made arrangements that Mr. Cooney, the banker at the First National Bank at Mayetta, pay the taxes after my husband died. I do not know whether or not there was a bank account in my name. We would have this livestock for pasture about five months of the year during the summer season. We took stock for pasture from 1918 on up to 1933. This was true when we lived on the land as well as when we were not living on the land. We lived on this land until my husband's death. I recall that we moved to town just before he died—a year or so before he died. About a year ago I moved back on the land. Fear of losing the land is why I made my husband—suggested to my husband—that the taxes be paid. I had this fear all during the years that I paid the taxes on this land. I never signed any papers or applications or documents or wrote any letters at any time requesting a patent to this land.

There was no cross-examination.

Statutes Offered in Evidence

At this time plaintiff offered in evidence portions of the statutes of the State of Kansas, as follows:

G. S. 1935, 79-2301, G. S. 1935, 79-2302, G. S. 1935, 79-2311, G. S. 1935, 79-2319, G. S. 1935, 79-2322, G. S. 1935, [fol. 37] 79-2320, G. S. 1935, 79-2401, G. S. 1935, 79-2411, G. S. 1935, 79-2501, G. S. 1935, 79-2505, G. S. 1935, 79-2306. (Tr. 30.)

W. A. Cooney, Witness for Plaintiff

Thereupon, plaintiff called W. A. Cooney as a witness in its behalf, and said W. A. Cooney testified as follows:

Mr. Name is W. A. Cooney. I lived at Mayetta, Kansas. I have lived there thirty or forty years. I am cashier of the First National Bank at Mayetta. I have been cashier for thirty years.

I know M-Ko-Quah-Wah. I have known her about thirty years. I knew her husband, Andrew Wabaunsee, about

forty years. They were customers of the bank. Andrew Wabaunsee came to the bank as a regular customer in the ordinary transactions of business. At times he would consult with me and advised with me as his banker in connection with business transactions. I had no business transaction with M-Ko-Quah-Wah during her husband's lifetime. She may have been in the bank but not in the transaction of business. Andrew Wabaunsee transacted the business with me in the bank. There was a bank account carried there by Andrew Wabaunsee. There was no bank account carried during his lifetime by his wife. Andrew Wabaunsee died about 1927. I am not positive. I was the administrator of Andrew Wabaunsee's estate. The First National Bank of Mayetta is the institution referred to on the back of the fee patent, part of Government's Exhibit 1. The fee patent was recorded by the Register of Deeds and sent to the bank. I don't remember the incident but on the face of it the bank must have had the fee patent. I think I was administrator after the patent was recorded. The fee for recording the patent was paid by the bank for the Waba-nsees for the Wabaunsee account. Sometime after the death of Andrew Wabaunsee there was an administrator's account opened. I was the administrator. The estate has been closed. The account was transferred to W. A. Cooney as administrator of Andrew Wabaunsee. It shows on the sheet that this transfer was made June 11, 1930. The administrator's account was closed June 2, 1932. An account was opened for M-Ko-Quah-Wah November 6, 1930. That was the first time an account was in her name. Andrew Wabaunsee could not write. He signed his name by mark or authorized [fol. 38] someone to sign his name. After Andrew Wabaunsee died I had a talk with his widow concerning the subject of taxes or handling of property. It was not very long after her husband's death. The substance of the talk was that she wished us to attend to the payment of taxes and business the same way as we had for her husband.

Cross-examination.

On cross-examination by counsel for the defendants, this witness testified as follows:

As administrator of the estate of Andrew Wabaunsee, I paid taxes covering the property involved in this controversy. I paid two and a half years' taxes and included

those in my report as executor and administrator. I paid taxes on this property for the last half of 1929 out of the estate of Andrew Wabaunsee. I know that I paid them. I did pay them. I know that I paid the taxes on this land out of the estate of Andrew Wabaunsee for the year 1930. I included that in my reports. I think I paid the taxes on this property for the year 1931 out of the estate of Andrew Wabaunsee. During Andrew Wabaunsee's lifetime I always paid the taxes out of the account in the name of Andrew Wabaunsee. I do not remember how we happened to record the patent. During her husband's lifetime I never had any business with M-Ko-Quah-Wah, nor to my knowledge did she do any business in the bank. I never saw her make a deposit. I made a return of the balance shown in the inventory.

Redirect examination:

On redirect examination, Mr. Cooney testified as follows:

During the year 1918 until the time they moved to Mayetta, M-Ko-Quah-Wah and her husband, Andrew Wabaunsee, lived on the 160-acre farm in question. They lived there from the time I first knew them until they moved to Mayetta. They moved to Mayetta a short time before his death.

Alice Battese, Witness for Plaintiff

Thereupon, plaintiff called Alice Battese as a witness in its behalf, and said Alice Battese testified as follows:

My name is Alice Battese. M-Ko-Quah-Wah is my mother. I am fifty-five years old. I know the land in ques-[fol. 39] tion in this lawsuit. I lived on that land. I must have been about eight or nine years old when I first went to this land to live. My mother lived on the land about thirty-five years. They lived on the land until moving to Mayetta. They moved to Mayetta in March, 1927. Andrew Wabaunsee is my step-father. He died June 3, 1929. My mother and step-father were living in town at the time. Last February of this year my mother returned to this land. My stepfather farmed the land as long as he was able, and when he got sick he got someone to help him. They took stock in every spring. I would say about forty head. They would be pastured during the summer season. They got $1.50 per head per month for the big cattle and

around $1.00 for the yearlings. My mother cannot talk English. My stepfather was an Indian and he could not read or write.

I heard a conversation between my stepfather and my mother relative to the payment of taxes. This was just about the time the competency commission was sent from Washington when they went around to different homes on the reservation to see if they were competent to pay taxes. This was along about 1918. I heard directions given by my mother to my stepfather relative to taxes. My mother said to my stepfather that he ought to pay the taxes. They didn't want to lose the land. She wanted to know if there could be something done about turning the patent back to Washington. When she received the patent she was afraid they would lose it if they did not pay the taxes, and she told my stepfather to go ahead and pay it when it was time to pay taxes. She always told my stepfather to handle her affairs. She said she wanted the patent sent back to Washington. I heard several talks about taxes between my mother and stepfather. They were all about the same nature. My stepfather, Andrew Wabaunsee, looked after the business. My stepfather had no land or property at the time my mother got this land or along in there in those years. He did not get any allotment of land up there. I do not know of my stepfather owning any land in Kansas or elsewhere at the time of his marriage to my mother. He owned some land which he inherited from one of the girls. He inherited a half interest in an interest of my sister's at one time. It was after she died. My sister died in 1901. I do not know of his ever owning any other land except this. I have two half sisters living now and five have died. They were children of Andrew Wabaunsee and [fol. 40] my mother. I never knew of my mother carrying a bank account in her own name. Andrew Wabaunsee had no other business occupation than farming this land.

Cross-examination

On cross-examination by counsel for defendants, this witness testified as follows:

All of this land was in pasture except about twenty-eight acres, and then later on ten acres were broken up so there were about forty acres in cultivation. In 1918 they always called it twenty-eight acres in cultivation. They increased the acreage under cultivation about three years ago. I do

not know how many acres are necessary to pasture and feed one head of cattle. He rented land from my sister before she died. He farmed it before she died. She was just twelve years old when she died.

Thereupon, plaintiff rested.

Thereupon, defendants to maintain the issues on their part introduced the following exhibits:

DEFENDANTS' EXHIBIT "A"

Defendants' Exhibit A is a certified copy of the account and inventory in the Estate of Andrew Wabaunsee, deceased. Defendants offered only the inventory, which shows in part as follows:

	Appraised Value
Household Goods	$ 75.00
Ford Automobile	325.00
Certf. Deposit of First Nat'l Bank, Mayetta, Kansas dated May 7, 1930	2,000.00
Certf. Deposit of Exch. St. Bk., Mayetta (closed), dated Oct. 29, 1929	110.00
4th Llb. Bonds U. S., dated Oct. 24, 1917	200.00
Checking Acct. 1st Nat'l Bank	415.00
Checking Acct. Exch. St. Bank	3.00
Lot 19, Harrington's Add., Third Street, Mayetta, Jackson County, Kansas	1,000.00
Total Appraised Value	$4,128.00

This inventory was subscribed and sworn to by W. A. Cooney, Administrator of the Estate of Andrew Wabaunsee, [fol. 41] deceased, on June 28, 1930, before H. D. Jones, a Notary Public. This exhibit was properly authenticated.

On such exhibit being offered in evidence, the plaintiff made the following objection:

"The Government objects as incompetent, irrelevant and immaterial, only tending to encumber the record. Any material matters in that have already been brought out. We think so at least, and we are objecting to it as a whole.

Mr. Brewster: We will offer only the inventory.

The Court: Just the inventory, yes.

Mr. Alexander: That isn't binding upon anyone in this case.

The Court: It will be received.

Mr. Alexander: Exception please." (Tr. 64.)

DEFENDANTS' EXHIBIT "B"

Defendants' Exhibit B is a certified copy of a fee patent issued to M-Ko-Quah-Wah covering property other than the 160 acres involved in this lawsuit. This exhibits shows as follows:

"Patent

958353.
92197-20 4-1071
237

The United States of America

To All To Whom These Presents Shall Come, Greeting:

Whereas, An Order of the Secretary of the Interior has been deposited in the General Land Office, directing that a fee simple patent issue to the Claimant M ko quah wah, heir of Pis Che dwin, a Prairie Pottawatomie Indian, for the North half of the Southeast quarter of the Southwest quarter of Section seventeen in Township nine south of Range fourteen east of the Sixth Principal Meridian, Kansas, containing twenty acres.

Now Know Ye, That the United States of America, in consideration of the premises, Has Given and Granted, and by these presents, Does Give and Grant, unto the said claimant and to the heirs of the said claimant the Land above de- [fol. 42] scribed: To Have and To Hold the Same, together with all the rights, privileges, immunities and appurtenances, of whatever nature, thereunto belonging, unto the said claimant and to the heirs and assigns of the said claimant, forever. The land covered by this patent is not liable for any debt contracted prior to this date, as provided by Section 5 of the Act of February 8, 1887, (24 Stat. 388, 389), and the amendatory Acts of May 8, 1906 (34 Stat. 182), and June 21, 1906 (34 Stat. 325, 327).

In Testimony Whereof, I, Woodrow Wilson, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

Given under my hand, in the District of Columbia, the Eighteenth day of January in the Year of Our Lord one thousand nine hundred and twenty-one and of the Independence of the United States the one hundred and forty-fifth.

By The President:

Woodrow Wilson, by M. P. Leroy, Secretary. L. Q. C. Laniar, Recorder of the General Land Office. (Seal.)

Recorded Patent Number: 790,644.

This instrument was filed for record on the 4" day of March, A. D. 1930, at 11:30 A. M.

Ella Teer, Register of Deeds.

STATE OF KANSAS,
County of Jackson, ss:

I, Floss Hasson, Register of Deeds in and for the above-named County and State, do hereby certify that the above and foregoing is a true and correct copy of a Patent as is found recorded in Volume 68 of Deeds at page 553, in the office of register of deeds in above-named county.

In Witness Whereof, I have hereunto set my hand and affixed my official seal on this 9" day of December, A. D. 1937.

(Signed) Floss Hasson, Register of Deeds. (Seal.)"

[fol. 43] Frances Fletcher, Witness for Plaintiff

Thereupon, defendants called as a witness MRS. FRANCES FLETCHER, who being duly sworn testified as follows:

My name is Frances Fletcher. I am deputy county treasurer of Jackson County. In the spring of 1919 to January, 1923, I was deputy county clerk. The land in question was on the tax rolls in the spring of 1919.

Thereupon, defendants closed their case. The foregoing was all the evidence introduced on the trial of this cause.

PLAINTIFF'S MOTION FOR JUDGMENT

Whereupon, the plaintiff moved the court for judgment at the close of all of the evidence, which motion omitting caption and formal parts is as follows:

"Comes now the plaintiff, at the close of all the evidence, and moves the court to instruct the jury to return a verdict in favor of the plaintiff and against the defendant, the Board of County Commissioners of the County of Jackson, State of Kansas.

(a) For the full amount of the taxes and penalties paid by and on behalf of M-Ko-Quah-Wah, in the sum of $1,966.13; and,

(b) For interest at the rate of six per cent per annum on each of the items of taxes paid from the date they were paid unto this date, stipulated to be $1,311.36."

Whereupon, an adjournment was taken until December 17, 1937, at ten o'clock A. M. On December 17, 1937, at ten o'clock A. M., the following proceedings were had, to-wit:

The court overruled the plaintiff's motion to instruct the jury to return a verdict in favor of plaintiff and against the defendant, The Board of County Commissioners.

INSTRUCTIONS GIVEN BY THE COURT

Thereupon, the court read its instructions to the jury as follows:

"The Court: Gentlemen of the jury, it now becomes my duty to tell you what the law of this case is that shall govern you in your deliberations and in arriving at a determination [fol. 44] of the fact or facts which you are called upon to determine. The petition filed by the Government in this case says substantially, the United States of America for its cause of action against the defendant, that is, the Board of County Commissioners and the county, states that at all times mentioned one M-Ko-Quah-Wah was an allottee No. 193, and an incompetent Indian of the Prairie Band of the Pottawatamie tribe; that the defendant, that is the County Commissioners or the Board of County Commissioners is a

quasi-public corporation existing as a body politic, etc., under the laws of the State of Kansas; that the plaintiff, the United States of America, is a corporate sovereign and body politic; that long prior to the year 1918, there was set aside for the use and benefit of such allottee, M-Ko-Quah-Wah, the following described real estate lying and situated in Jackson County, Kansas, and then it describes the particular tract; that under the treaty existing between the United States and such band of Indians, the land above described is not subject to taxation by the state and subdivisions of the state or municipal authorities until such time as a trust relation between the United States and such band of Indians and the several allottees thereof should expire; that such trust relationship existed between the United States Government and such band of Indians and such allottees from long prior to the year 1918 until the filing of this action, and that such relationship continues to exist; that on or about the 15th of August, 1893, a trust patent was issued to M-Ko-Quah-Wah, the allottee of such Prairie Band of Pottawatomie Indians, covering the above-described land; that the patent specifically provided among other things that the United States, in consideration of the premises and in accordance with other laws, for the period does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of said M-Ko-Quah-Wah, or in case of her decease, for the sole use of her heirs, etc.; that before the expiration of the trust period specified in such patent, which by its terms expires August 15, 1918, a patent in fee was arbitrarily issued to M-Ko-Quah-Wah without her consent and without any application having been made by her for a patent, and on her express refusal to sign the application for a patent; that the patent so arbitrarily issued was dated April 17, 1918, and on its face purported to convey the land in fee simple to her; that on or about May 31, 1935, the said fee simple patent so issued to such allottee was [fol. 45] cancelled at the request of such patentee under the authority of the Act of Congress approved February 26, 1927; that such patent to such Indian was void and of no force or effect and was illegally issued in its inception; that as provided by the terms of the trust patent above referred to, it was expressly provided that the President of the United States may in his discretion ex-end the trust period, and in pursuance of such provision of the trust patent and the provisions of Law of July 30, 1918, the President of the

United States did extend such trust provisions of the patent for a period of ten years, and thereafter on April 16, 1928, the President of the United States, by Executive Order, further extended the trust period for an additional ten years; that commencing with the year 1919, the defendant Board of County Commissioners of the County of Jackson, wrongfully placed the above-described real estate upon the tax rolls of Jackson County, and thereafter there was illegally assesed and collected from the said M-Ko-Quah-Wah certain taxes and that the following statement, and it is set out here, correctly indicates the number of the tax receipts and the years such taxes were paid, the amounts thereof, etc.; that as shown by such statement there was due to the plaintiff for taxes paid to and including the year 1933, the sum of $1,966.00 and interest thereon to September 1, 1936, from the date each item was paid in the sum of $1,106.74. It is stipulated between the parties that the amount of tax and penalty paid was $1,966.13. That the interest at six per cent per annum on the items of taxes and penalties paid to the date of December 6, 1937, was $1,311.36. That is the amount of interest and taxes. The Government alleges here that each and every payment of taxes as indicated by the statement, was illegally paid and received by the defendant County of Jackson, and that the defendant county is indebted to the plaintiff on each and every one of said items from the date they were respectively paid, etc. The plaintiff further states that application was made to the defendant for a refund of said taxes and such application has been rejected, wherefore, the plaintiff prays judgment for the amount of the taxes and interest.

"In answer to this petition the defendant has filed an answer in which it denies each and every allegation in the petition, except as specifically admitted in its answer. It admits the plaintiff's petition first that it is a body politic as alleged and that the United States is; denies that M-Ko-Quah-Wah was an incompetent Indian at any of the times mentioned; [fol. 46] alleges that the said Indian woman, M-Ko-Quah-Wah, was the owner in fee simple of the following real estate, and then it describes the said land, and that she has been the owner of said property ever since the time of the issuance of this patent. Further answering, the defendants allege that the action is barred by the three year statute of limitation and also that the action is barred by the pro-

visions of certain statutes of Kansas, and pray that the plaintiff take nothing by reason of this suit and that defendants recover their costs herein. To this answer then, the Government has filed a reply in which it denies all of the allegations of the answer that are inconsistent with the allegations of its petition.

"These papers we call the pleadings. The petition, the answer and the reply do not constitute any evidence in the case. They are the written allegations of the parties as to what their claims are. The burden of proof is upon the plaintiff. It is for it to prove its cause of action by a preponderance of evidence. A preponderance of evidence is simply meant the greater weight of the evidence. When you have weighed all the evidence upon any disputed question of fact, and there are only one or two, perhaps only one disputed question of fact here for your consideration, when as I say, you have weighed that dispute, if you find there is a greater weight on the side of the plaintiff than on that of the defendants, the plaintiff has proven its contention by a preponderance of the evidence, and your verdict should be for it, that is, for the plaintiff, upon the particular issue in question. If you find the evidence equally balanced, or if you find there is not a greater weight on the side of the plaintiff on that issue than on that of the defendant, then the plaintiff has failed to prove i-s contention by a preponderance of the evidence, and upon that question or issue, your decision would be for the defendant.

"Now the United States Government on November 15, 1861, on the Kansas River, entered into a treaty with the Prairie band of Pottawatomie Indians by the terms of which it was provided that lands allotted to the members of that band of the Pottawatomie Indians shall be exempt from levy of taxation and sale until otherwise provided by law. This being a treaty between the Government and the Indians, no state may tax the land allotted to the Indian without his consent. The Indians depend largely upon fair treatment of [fol. 47] the Federal Government in maintaining its treaty obligation with such Indians, and the Government is charged with the duty of protecting and caring for the Indian race and the members of such race.

"This suit is brought by the United States in its sovereign capacity, and because the United States is charged with the duty of seeing that its treaties made with the Indian Nation,

such as the Pottawatomie Nation or tribe of Indians, are carried out. The treaty made and duly approved by the President and confirmed by the senate is binding upon all of the states of the Union and no state or sub-agency thereof has the right to change or violate the terms of such treaty.

"The evidence in this case shows that M-Ko-Quah-Wah is a full blooded Pottawatomie Indian. That she does not understand the English Language; that she is of the Prairie band of the Pottawatomie Indians; that she has never severed her tribal connections with such band; that on or about June 2, 1893, M-Ko-Quah-Wah was placed upon the schedule of allotments as allottee No. 193 of the Prairie Band of Pottawatomie Indians, and there was allotted to her on such registration rolls, the northeast quarter of section 11, township—well now, it is the land involved in this case, in Jackson County, Kansas. That on August 15, 1893, a trust patent was issued to her by the President of the United States to the land involved herein, wherein it was declared that it will hold the land thus allotted for a period of twenty-five years in trust for the sole use and benefit of said M-Ko-Quah-Wah or in case of her decease, for the sole use of her heirs according to the law of the state and territory where such land was located and that at the expiration of said patent, the United States will convey the same, or at the expiration of said trust agreement, the United States will convey the same by patent to said Indian, or her heirs in fee, discharged of said trust and free of all charges or incumbrances whatsoever, provided that the President of the United States may in his discretion extend such period; that thereafter on July 30, 1918, by executive order of the President of the United States, the trust patent was extended for a period of ten years, and thereafter on April 16, 1928, the President of the United States extended the trust period for an additional ten years. The result of such extension is that the trust period specified in the trust deed has not expired. I think the facts show, without any question, that said M-Ko-[fol. 48] Quah-Wah did not make an application for, or consent to the issuance of a patent in fee covering the above-described real estate. Irrespective of the fact that the said M-Ko-Quah-Wah did not make an application for a patent in fee, the President of the United States on April 17, 1918, issued a patent in fee to her, a Pottawatomie Indian, for the land above described; that on May 31, 1936, pursuant to the Act of Congress of February 27, 1927, the fee patent issued

M-Ko-Quah-Wah, a Pottawatomie Indian, on the land above described, was cancelled by the Department of the Interior and that the land involved has never been mortgaged or encumbered or sold in whole or in part by the said M-Ko-Quah-Wah.

"The evidence in this case also discloses that the administrator of the estate of Andrew Waubaunsee may have paid the taxes for the last half of 1929 and 1930 and 1931.

"Now, if the funds in the hands of the administrator were accumulated or largely accumulated from the income from the land in question, M-Ko-Quah-Wah being his wife, a widow, and entitled under the law to have the property, then the payment of such taxes by the administrator would amount to no more than an assignment on behalf of the widow and under such circumstances the United States would be entitled to recover for such taxes so paid by the administrator. The fact that the First National Bank of Mayetta, Kansas, or some officer or agent of such bank may have recorded the patent in fee, does not of itself show that the Indian, M-Ko-Quah-Wah, consented to have the land involved placed upon and taxed by the county authorities of Jackson County, nor does the fact that the Indian, M-Ko-Quah-Wah, or her husband or someone in her behalf has paid the taxes to the County Treasurer of the defendant Jackson County, establish of itself that such taxes were paid voluntarily. If the plaintiff has a right to recover in this case, then it has the right to recover all taxes, interests and penalties paid by M-Ko-Quah-Wah and by her husband and by the First National Bank of Mayetta, Kansas, or any agent or officer of such bank, if paid on behalf of the said M-Ko-Quah-Wah, together with interest thereon at the rate of six per cent per annum from the date of the respective payment until the date of your verdict in this case. Your verdict can only be as against the defendant, The Board of County Commissioners of Jackson County in the State of Kansas. The statutes of the State of Kansas provide that [fol. 49] interest should be charged on delinquent taxes and if taxes continue delinquent, the land may, in the course of time, be sold for taxes and thereafter that the County Clerk shall issue a tax deed if redemption be not made. It is not necessary here to detail the Kansas Statutes.

"If the jury finds that these taxes were paid by M-Ko-Quah-Wah and paid in her behalf out of her funds; and such taxes were not voluntarily paid, then as to all such

taxes, penalties and interest, the plaintiff would be entitled to recover.

"If the taxes paid by M-Ko-Quah-Wah were paid through a well founded apprehension that if she did not pay them, she would be compelled to pay a large amount of interest and penalties and eventually lose her land by a tax deed, then that payment under such circumstances would not be a voluntary payment. It is not necessary that the taxes should have been paid under protest in order to entitle the plaintiff to recover in this case. To constitute a voluntary payment of taxes, the party must have paid them with knowledge of her rights and paid them with a desire to pay them and not because of fear and apprehension of losing the land and of incurring interest and penalties if they were not so paid.

"If you find from the evidence that the taxes sought to be recovered by the plaintiff were paid voluntarily, then in that event your verdict would be for the defendants for the amount that was paid voluntarily.

"If you find from the evidence that some person or parties, other than M-Ko-Quah-Wah, paid said taxes out of money not belonging to M-Ko-Quah-Wah and not repaid to such person or parties by M-Ko-Quah-Wah, then in and in that event, the plaintiff is not entitled to recover those particular items and taxes.

"You gentlemen are the sole judges of the credibility of the witnesses and of the weight and value to be given their testimony. In passing upon the credibility of any witness, you have the right to take into consideration his conduct and demeanor upon the witness stand, his interest, if any, upon the outcome of the case, the reasonableness or unreasonableness of his testimony, and the probability or lack of probability and the opportunity which the witness had to observe the facts concerning which he has given testimony, the consistency of statements made by him on the witness stand with statements made by him at other [fol. 50] times and places. All these things you will take into consideration in passing upon the credibility of any witness. If you believe that any witness has wilfully sworn falsely to any material facts in testimony, then you are at liberty to disregard the whole or any part of that witness's testimony which you do not deem entitled to credit. You will give to the testimony of such and each witness just that weight and value you believe it is entitled to receive.

"It is your duty as the finders of the facts to take and consider these instructions as a whole and not to separate or single out any particular part and depend upon that alone.

"If counsel in their argument or in the progress of the trial of the case have made any statements of the evidence which are not in accordance with your recollection of the evidence, or if I have made any statements which are not in accordance with your recollection of the evidence, it is your duty to depend upon your recollection of what the evidence is because you are the ultimate finders of the facts and you must depend upon your own memory as to what the evidence is. You are to consider the evidence as given from the witness stand here and not consider outside matter that was not brought out in evidence in the trial in the case."

The defendants objected to the instructions read by the court to the jury as follows:

"Mr. Brewster: We except to the instruction that if the Government is entitled to recover at all, they are entitled to recover for interest at six per cent on these items, and we except to that instruction and suggest the instruction that the Government is in no event entitled to interest.

The Court: All right.

Mr. Brewster: We request an instruction that the payment of taxes voluntarily and without protest and the payment of them over a number of years, would constitute a consent on the part of the party paying taxes and would amount to a waiver of any objections that this Indian woman might have had to the issuance of the fee patent and that it was a ratification of the issuance of this patent.

We request an instruction that the plaintiff is not entitled to recover for any taxes paid during the years between the [fol. 51] years when the fee simple patent was issued and until it was actually cancelled by order of the Secretary of the Interior.

The Court: Well, I can't give any instructions like that.

Mr. Brewster: We except to your refusal to give it. We request an instruction that when M-Ko-Quah-Wah made application for the patent for this additional twenty acres, she automatically became a citizen of the United States and ceased to be a ward.

The Court: No, I can't do that.

Mr. Brewster: To which we except, and we request an instruction that the Secretary of the Interior, or Competency Commission, no, that the Secretary of the Interior made an order that M-Ko-Quah-Wah was capable of managing her own affairs and that that order has never been cancelled.

The Court: No.

Mr. Brewster: We except to that. We except to that instruction where it was stated that the administrator was bound to pay these taxes and return it to them.

Mr. Hunt: It was charged as expense on the account, and also, your Honor, it was charged as an expense of the estate on the account, and there is no testimony that he was going to turn it to her.

Mr. Alexander: It is not binding upon the Government your Honor.

Mr. Brewster: We except to the instruction with reference to what the Kansas Statutes provide with respect to interest charges on delinquent taxes, etc. We except and object to that instruction with reference to protest that the Court used. That is, it is not necessary to show that the taxes have been paid under protest, and we except to the instruction as to what constitutes a voluntary payment of taxes, more specifically that the party must have paid them with knowledge of her rights and not because of fear. I want to except to the instruction or the statement in the instruction that the evidence shows that she did not apply for, or did not consent to the issuance of the fee simple patent.

The Court: All right.

Mr. Hunt: Has your Honor passed on that?

[fol. 52] The Court: Yes, he has just taken exception to what I have already given.

Mr. Brewster (continuing): And on all those I requested and he refused to give, we except to the ruling."

Said exceptions were allowed.

The defendants prior to said charge and to the argument of counsel presented to the court and requested the court to give to the jury the following instructions:

Instructions Requested by Defendants

I

You are hereby instructed that under the evidence the plaintiff has failed to establish a cause of action against the defendants. You are, therefore, instructed to find for the defendants.

If the court does not give this instruction, then in the alternative each of the defendants request the court to give the jury the following instructions:

II

You are instructed that in no event is the plaintiff entitled to recover interest on any of the taxes paid. Therefore, if your verdict should be for the plaintiff, you are instructed not to allow any interest.

III

You are instructed that if you find from the evidence that the taxes sought to be recovered by the plaintiff were paid voluntarily and without protest by and on behalf of M-Ko-Quah-Wah, then and in that event you are instructed that your verdict must be for the defendants.

IV

You are instructed that if the payment of these taxes was made voluntarily and without protest, that would constitute consent and acquiescence of M-Ko-Quah-Wah to the issuance of the fee patent, and furthermore that would constitute a waiver of any objections said Indian might have made to the issuance of the fee patent and was a ratification of the issuance of the fee simple patent. Therefore, if you find that said payments were made voluntarily and without protest, you are instructed to find for the defendants.

[fol. 53]

V

You are instructed that the plaintiff is not entitled to recover for any of the taxes paid for the years between the date of the issuance of the fee simple patent and the order of cancellation by the Secretary of the Interior.

VII

You are instructed that if you find from the evidence that M-Ko-Quah-Wah or the plaintiff did not file any claim with the officials of Jackson County, Kansas, on or before May 15, 1933, under the provisions of the Kansas Cash Basis Law, which is Chapter 319 of the Laws of 1933, then and in that event you are instructed that the plaintiff is not entitled to recover any taxes paid prior to May 15, 1933. This, however, does not mean the plaintiff is entitled to recover payments made after May 15, 1933, if under some other instruction you find the plaintiff is not entitled to recover.

VIII

An instruction that if M-Ko-Quah-Wah made application for the patent to the twenty acres, when such patent was issued, she automatically became a citizen and ceased to be a ward of the government.

IX

You are instructed that the Secretary of the Interior made an order that M-Ko-Quah-Wah was capable of managing her own affairs, which order has never been cancelled.

The court refused to give all of said instructions as requested by the defendants.

The defendants, in the presence of the jury and before they retired to deliberate upon their verdict, excepted to the ruling of the court refusing to give and read to the jury the instructions requested by the defendants. The defendants' objections were as hereinbefore set out on pages 28 to 30 and as follows:

"Mr. Brewster (continuing): And on all those I requested and he refused to give, we except to the ruling."

The jury thereupon retired to consider their verdict.

[fols. 54-55] Thereupon, on December 17, 1937, the jury rendered a verdict for the plaintiff and against the defendant, which, omitting caption, is as follows:

VERDICT

"We, the jury in the above-entitled case, duly impaneled and sworn, upon our oaths find for the plaintiff, and assess its damages at $3277.49.

Bert Metzger, Foreman."

Thereupon, defendants by their counsel on December 18, 1937, moved for a new trial, which motion omitting caption and formal parts is as follows:

DEFENDANTS' MOTION FOR NEW TRIAL

"Comes now the defendants in the above-entitled cause and move this court for an order setting aside the verdict and judgment if any herein and granting a new trial for the following reasons:

1. Erroneous rulings and instructions of the court.

2. That the verdict is in whole or in part contrary to the evidence.

3. The court held that the Kansas cash basis law did not apply in this case.

4. The evidence does not show that these taxes were paid by or on behalf of M-Ko-Quah-Wah.

5. The court held that Title 25, U. S. C. A., Sec. 352a is retroactive and that plaintiff was entitled to recover taxes paid prior to passage of the law and prior to the cancellation of the patent.

6. The verdict is contrary to law.

7. The court erred in instructing the jury that plaintiff was entitled to recover interest.

8. The evidence shows that the taxes were paid voluntarily and without protest.

9. The court erred in instructing the jury that M-Ko-Quah-Wah did not consent to the issuance of the patent.

10. The evidence does not show that the taxes were paid by money belonging to M-Ko-Quah-Wah."

[fol. 56] Said motion for a new trial was denied by the court.

* * * * * * * * *

[fols. 57-60] In United States District Court

Order Settling Bill of Exceptions on Stipulation—Filed June 8, 1938

The parties to the above-entitled action, through their respective counsel of record, having stipulated in writing that the proposed bill of exceptions, presented herewith, consisting of pages numbered 1 to 36, inclusive, contains a true statement of the proceedings had upon the trial of the cause, and contains all the material evidence produced at the trial of said cause, and the same having been duly considered by the judge of this court, who presided at the trial of said cause, and the same appearing to be in all respects proper,

It Is Ordered and Certified that the above and foregoing instrument, consisting of pages 1 to 36, inclusive, be and the same hereby is approved, settled, and allowed as the bill of exceptions in said cause.

Dated this 8th day of June, 1938.

Richard J. Hopkins, District Judge.

[fol. 61] Order of Submission—September 14, 1938

This cause came on to be heard and was argued by counsel, George M. Brewster, Esquire, appearing for appellant, Raymond M. Kell, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

In United States Circuit Court of Appeals, September Term, 1938

No. 1728

Geo. M. Brewster (Warden L. Noe, Floyd W. Hobbs, John L. Hunt with him on brief) for appellant.

Raymond M. Kell, Attorney, Department of Justice (Charles E. Collett, Acting Assistant Attorney General,

Summerfield S. Alexander, U. S. Attorney, Oscar Provost, Attorney, Department of Justice, with him on brief) for appellee.

Before Phillips, Bratton and Williams, Circuit Judges

OPINION—December 10, 1938

WILLIAMS, Circuit Judge, delivered the opinion of the court:

The United States of America instituted this action under direction of its Attorney General, in accordance with Section 24 of the Judicial Code as amended (28 U. S. C. A. 41 [1]), in the District Court of the United States for the District of Kansas, in behalf of M-Ko-Quah-Wah, its restricted or incompetent Indian ward, of the Pottawatomie Indians, hereinafter referred to as allottee, against the Board of County Commissioners of Jackson County, Kansas, to recover taxes collected by said county during the years 1919-1933, inclusive, upon land which had been allotted to said Indian under the General Allotment Act of February 8, 1887.

The trial court submitted the disputed questions of fact to the jury, a verdict being returned in favor of the govern-[fol. 62] ment. The judgment of the trial court on said verdict was rendered on December 17, 1937. Petition for appeal was filed and allowed March 15, 1938, jurisdiction of this court being invoked under Section 128 of the Judicial Code as amended, (28 U. S. C. A., Section 225a, page 294).

By Treaty of June 5 and 17, 1846, (9 Stat. 853), the United States of America, for a consideration, granted to the Pottawatomie Tribe of Indians a tract of land within the territory now embraced within that of the state of Kansas "as their land and home forever."[1]

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[1] 9 Stat. 853: Indian Affairs, Laws and Treaties, Vol. II, 2d Edition, p. 557:

"Article 2. The said tribe of Indians hereby agree to sell and cede, and do hereby sell and cede, to the United States, all the lands to which they have claim of any kind whatsoever, and especially the tracts or parcels of land ceded to them by the treaty of Chicago, and subsequent thereto, and now, in whole or in part, possessed by their people, lying and being north of the river Missouri, and embraced in the limits of the Territory of Iowa; and also all that tract of

Under Treaty of November 15, 1861, 12 Stat. 1191, Indian Affairs, Laws and Treaties, by Kappler, Vol. II, 2d Edition, page 824, said reservation was to be surveyed and separate tracts therefr[illegible] assigned to those members who desired to take such tracts and who relinquished their rights to the [fol. 63] lands held in common by the tribe, and there was to be issued to each of such members a certificate establishing his or her exclusive right to the exclusive possession of the tract assigned to and set apart to him or her "for the

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country lying and being on or near the Osage River, and west of the State of Missouri; it being understood that these cessions are not to affect the title of said Indians to any grants or reservations made to them by former treaties.

* * * * * * *

"Article 4. The United States agree to grant to the said united tribes of Indians possession and title to a tract or parcel of land containing five hundred and seventy-six thousand acres, being thirty miles square, and being the eastern part of the lands ceded to the United States by the Kansas tribe of Indians, by treaty concluded on the 14th day of January, and ratified on the 15th of April of the present year, lying adjoining the Shawnees on the south, and the Delawares and Shawnees on the east, on both sides of the Kansas River, and to guarantee the full and complete possession of the same to the Pottowatomie Nation, parties to this treaty, as their land and home, forever; which they are to pay the United States the sum of eighty-seven thousand dollars, to be deducted from the gross sum promised to them in the 3d article of this treaty.

* * * * * * *

"Article 6. The said tribes of Indians agree to remove to their new homes on the Kansas River, within two years from the ratification of this treaty; and further agree to set apart the sum of twenty thousand dollars to the upper bands, (being five dollars per head), to pay the actual expenses of removing; and the sum of forty thousand dollars for all the bands, as subsistence money, for the first twelve months after their arrival at their new homes; to be paid to them so soon as their arrival at their new homes is made known to the Government, and convenient arrangements can be

perpetual and exclusive use and benefit of such assignees and their heirs," and "until otherwise provided by law, such tracts shall be exempt from levy, taxation, or sale, and shall be alienable in fee or leased or otherwise disposed of only to the United States, or to persons then being members of the Pottawatomie tribe and of Indian blood, with the permission of the President, and under such regulations as the Secretary of the Interior shall provide, except as may be hereinafter provided."[2]

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made to pay the same between the parties to this treaty; the aforesaid sums to be also deducted from the aggregate sum granted by the United States to said tribes of Indians by the 3d article of this treaty.

* * * * * * * *

"Article 8. It is agreed upon by the parties to this treaty that, after the removal of the Pottowautomie Nation to the Kansas Country, the annual interest of their 'improvement fund' shall be paid out promptly and fully, for their benefit at their new homes. If, however, at any time thereafter, the President of the United States shall be of opinion that it would be advantageous to the Pottowautomie Nation, and they should request the same to be done, to pay them the interest of said money in lieu of the employment of persons or purchase of machines or implements, he is hereby authorized to pay the same, or any part thereof, in money, as their annuities are paid at the time of the general payments of annuities. It is also agreed that, after the expiration of two years from the ratification of this treaty, the school-fund of the Pottowautomies shall be expended entirely in their own country, unless their people, in council, should, at any time, express a desire to have any part of the same expended in a different manner."

[2] "Article 1. The Pottawatomie tribe of Indians believing that it will contribute to the civilization of their people to dispose of a portion of their present reservation in Kansas, consisting of five hundred and seventy-six thousand acres, which was acquired by them for the sum of $87,000, by the fourth article of the treaty between the United States and the said Pottawatomies, proclaimed by the President of the United States on the 23d day of July, 1846, and to allot lands in severalty to those of said tribe who have adopted the

[fol. 64] By provisions of Treaty of March 29, 1866, with said tribe (14 Stat. 763; Indian Affairs, Laws and Treaties,

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customs of the whites and desire to have separate tracts assigned to them, and to assign a portion of said reserve to those of the tribe who prefer to hold their lands in common; it is therefore agreed by the parties hereto that the Commissioner of Indian Affairs shall cause the whole of said reservation to be surveyed in the same manner as the public lands are surveyed, the expense whereof shall be paid out of the sales of lands hereinafter provided for, and the quantity of land hereinafter provided to be set apart to those of the tribe who desire to take their lands in severalty, and the quantity hereinafter provided to be set apart for the rest of the tribe in common; and the remainder of the land, after the special reservations hereinafter provided for shall have been made, to be sold for the benefit of said tribe.

"Article 2. It shall be the duty of the agent of the United States for said tribe to take an accurate census of all the members of the tribe, and to classify them in separate lists, showing the names, ages, and numbers of those desiring lands in severalty, and of those desiring lands in common, designating chiefs and head-men, respectively; each adult choosing for himself or herself, and each head of a family for the minor children of such family, and the agent for orphans and persons of an unsound mind. And thereupon there shall be assigned, under the direction of the Commissioner of Indian Affairs, to each chief at the signing of the treaty, one section; to each head-man, one half section; to each other head of a family, one quarter section; and to each other person eighty acres of land, to include, in every case, as far as practicable, to each family, their improvements and a reasonable portion of timber, to be selected according to the legal subdivision of survey. When such assignments shall have been completed, certificates shall be issued by the Commissioner of Indian Affairs for the tracts assigned in severalty, specifying the names of the individuals to whom they have been assigned, respectively, and that said tracts are set apart for the perpetual and exclusive use and benefit of such assignees and their heirs. Until otherwise provided by law, such tracts shall be exempt from levy, taxation, or sale, and shall be alienable in fee or leased or otherwise disposed of only to the United States, or to persons then being

by Kappler, Vol. II, 2d Edition, p. 916), an amendment to the prior treaties was incorporated so as to extend the provisions thereof to the more prudent and intelligent mem-

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members of the Pottawatomie tribe and of Indian blood, with the permission of the President, and under such regulations as the Secretary of the Interior shall provide, except as may be hereinafter provided. And on receipt of such certificates, the person to whom they are issued shall be deemed to have relinquished all right to any portion of the lands assigned to others in severalty, or to a portion of the tribe in common, and to the proceeds of sale of the same whensoever made.

"Article 3. At any time hereafter when the President of the United States shall become satisfied that any adults, being males and heads of families, who may be allottees, under the provisions of the foregoing article, are sufficiently intelligent and prudent to control their affairs and interests, he may, at the request of such persons, cause the lands severally held by them to be conveyed to them by patent in fee-simple, with power of alienation; and may, at the same time, cause to be paid to them, in cash or in the bonds of the United States, their proportion of the cash value of the credits of the tribe, principal and interest, then held in trust by the United States, and also, as the same may be received, their proportion of the proceeds of the sale of lands under the provisions of this treaty. And on such patents being issued and such payments ordered to be made by the President, such competent persons shall cease to be members of said tribe, and shall become citizens of the United States; and thereafter the lands so patented to them shall be subject to levy, taxation, and sale, in like manner with the property of other citizens: Provided, That, before making any such application to the President, they shall appear in open court in the district court of the United States for the district of Kansas, and make the same proof and take the same oath of allegiance as is provided by law for the naturalization of aliens, and shall also make proof to the satisfaction of said court that they are sufficiently intelligent and prudent to control their affairs and interests, that they have adopted the habits of civilized life, and have been able to support, for at least five years, themselves and families."

bers of said tribe, not to be confined to males and heads of families of said tribe, without distinction of sex.[3]

Said allottee, a fullblood Pottawatomie Indian who did not speak English, on land on which the taxes here in controversy were collected and which having been allotted to her on May 31, 1893, and a trust patent thereto issued on [fol. 65] August 15, 1893, pursuant to the General Allotment Act of February 8, 1887,[4] and by executive orders dated July 30, 1918, and April 16, 1928, the trust period as provided and stipulated in said patent and said Act of Feb-

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[3] "Article 1. The beneficial provisions in behalf of the more prudent and intelligent members of said tribe, contained in the third article of the amended treaty above recited, shall not hereafter be confined to males and heads of families, but the same shall be and are hereby extended to all adult persons of said tribe, without distinction of sex, whether such persons are or shall be heads of families or otherwise, in the same manner, to the same extent, and upon the same terms, conditions, and stipulations as are contained in said third article of said treaty with reference to 'males and heads of families'."

[4] Section 5 of the General Allotment Act of February 8, 1887, 24 Stat. 388, 25 U. S. C. A. Section 348; Kappler's Indian Affairs, Laws and Treaties, Vol. I, 33, 34, 35, provides as follows:

"Upon the approval of the allotments provided for in sections 331 to 334, inclusive, and 336 by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period, the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever; Provided, That the President of the United States may in any case in his discretion extend the period * * *."

ruary 8, 1887, was extended for an additional 20 years, to-wit, until 1938,[5] such trust period later being extended indefinitely by Act of Congress; June 18, 1934. (Wheeler-Howard Act), c. 576, Section 2, 48 Stat. 984.

According to a finding by a competency commission appointed by the Secretary of the Interior,[6] said allottee and her husband were considered "very competent people." The President of the United States issued a fee-simple patent dated April 17, 1918. The application for the issuance of said fee-simple patent submitted to the Secretary of the Interior was not signed by her, the competency commission stating, "This allottee declined to sign an application," in fact, refused to sign such application—not desiring that [fol. 66] a fee-simple patent be issued to her. Such issuance was done altogether without her permission, and upon its

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[5] Act of May 8, 1906, c. 2348, 34 Stat. 182, 25 U. S. C. A. Section 349, provides:

"At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in Section 348, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State of Territory in which they may reside; * * * and thereafter all restrictions as to sale, encumbrance, or taxation of said land shall be removed * * *."

[6] Act of February 26, 1927, c. 214, 44 Stat. 1247, as amended by the Act of February 21, 1931, c. 271, 46 Stat. 1205, 25 U. S. C. A. Section 352a, provides:

"The Secretary of the Interior is hereby authorized, in his discretion, to cancel any patent in fee simple issued to an Indian allottee or to his heirs before the end of the period of trust described in the original or trust patent issued to such allottee, or before the expiration of any extension of such period of trust by the President, where such patent in fee simple was issued without the consent or an application therefor by the allottee, or by his heirs: Provided, That the patentee has not mortgaged or sold any part of the land described in such patent: Provided also, That upon cancellation of such patent in fee simple the land shall have the same status as though such fee patent has never been issued."

receipt she requested her husband to send it back to Washington, as her husband "did the business for her," handled the operation and management of her lands, the employment of farm help, the leasing of pasture lands, and the collection of all income from the farm. During his lifetime, she did not transact any business for herself, and did not have a separate or joint bank account.

After her husband's death about 1927, a banker in a bank at which her husband had carried the bank account opened the account in her name. The husband had not possessed any land at the time of his marriage to said allottee, and except for an inheritance of land, he had no substantial source of income beyond that received from the operation and management of allottee's land.

The allottee had advised her husband to pay the taxes "for fear that if we didn't we would lose the land," and after her husband's death she advised the banker for the same reason to pay the taxes.

The patent was recorded on April 7, 1930, by one of the officers of the bank, same not being done under the direction, knowledge, permission or consent of the allottee.

The land was placed on the county tax rolls for the years 1919-1934, inclusive.

The General Allotment Act and the terms of the patent issued pursuant thereto, which by extensions is still in force, created an immunity from taxation under the laws of the state, such exemption being a present vested right in the allottee which continued as binding upon the state and its subdivisions and which could not be taken away from the allottee by the mere issuance of the fee patent during the trust period without her consent. Board of County Comm. of Caddo County v. United States, (10th Cir.), 87 Fed. (2d) 55, 56, and cases there cited.

The Treaty of 1861 provided that the land should be exempt from taxation until otherwise provided by law and for the termination of the exemption upon the issuance of a patent in fee simple, such patent to be issued only upon request of the allottee. Such fee simple patent was issued not only without the request of the allottee, but also over her protest. Congress has not by law provided for the [fol. 67] termination of the exemption. On the contrary, by the General Allotment Act, such exemption extended until the termination of the trust period, which was duly extended until 1938, and later for an indefinite period by

Act of June 18, 1934.[7] Caddo County case, supra, (87 Fed. [2d] 55), and cases therein cited; Choate v. Trapp, 224 U. S. 665; and Ward v. Love County, 253 U. S. 17.

In Ward v. Love County, supra, it is said (at pages 23 and 24):

"As the payment was not voluntary, but made under compulsion, no statutory authority was essential to enable or require the county to refund the money. It is a well settled rule that 'money got through imposition' may be recovered back; and, as this court has said on several occasions, 'the obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.' * * * To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. Of course this would be *in contravention of the Fourteenth Amendment, which binds the county as an agency of the State.*" (Italics supplied.)

The land was immune from the assessments from taxation, the same being void.[8] The findings and judgment are supported by substantial evidence.

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[7] "The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress." (June 18, 1934, c. 576, Sec. 2, 48 Stat. 984.)

[8] Choate v. Trapp, 224 U. S. 665; Ward v. Love County, 253 U. S. 17; Board of Com'rs of Caddo County, Okl. v. United States, (10th Cir.), 87 Fed. (2d) 55, 56; Board of Com'rs of Tulsa County, Okl. v. United States, (10th Cir.), 94 Fed. (2d) 450; United States v. Benewah County, (9th Cir.), 290 Fed. 628; United States v. Nez Perce County, Idaho, (9th Cir.), 95 Fed. (2d) 232; United States v. Lewis County, Idaho, (9th Cir.), 95 Fed. (2d) 236; Morrow v. United States, (8th Cir.), 243 Fed. 854; United States v. Glacier County, (D. C., Mont., 1936), 17 Fed. Supp. 411; United States v. Board of County Com'rs., (D. C. N. D. Okla.), 13 Fed. Supp. 641; United States v. Dewey County, S. D., (D. C. S. D., 1926), 14 Fed. (2d) 784; United States v. Board of Com'rs, (D. C., W. D., Okla.), 6 Fed. Supp. 401; United States v. Chehalis County, (D. C., Wash.), 217 Fed. 281.

Section 284 (Judicial Code, Section 177, as amended), 28 U. S. C. A. page 119, provides that no interest shall be al- [fol. 68] lowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, except that interest may be allowed in any judgment of any court rendered against the United States for any internal revenue tax erroneously or illegally assessed or collected, or for any penalty collected without authority or any sum which was excessive or in any manner wrongfully collected, under the internal revenue laws.

Under the Fifth Amendment to the Constitution of the United States, which provides that private property shall not be taken for public use without just compensation, a claimant would have been entitled to just compensation, by way of recompense, for the money wrongfully taken. The claim here is founded on the protection of the Fourteenth Amendment. (Ward v. Love County, supra.) In the Phelps case, 274 U. S. 341, where the property was taken before its value was ascertained or paid, it was held that judgment rendered in 1926 for the value of the use of the property in 1918 and 1919, without more, is not sufficient to constitute just compensation, and that said Section 177, supra, does not prohibit the inclusion of the additional amount for which petitioner contends in order to fully compensate the claimant, and that it was not a claim for interest within the purpose or intention of said Section 177; Acts of Congress to be construed and applied in harmony with and not to thwart the purpose of the Constitution, the government's obligation being to put the owners in as good position pecuniarily as if the use of their property had not been taken, they being entitled to have the full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking.

In Seaboard Air Line Ry. v. United States, 261 U. S. 299, it is stated that on May 23, 1919, the United States, under authority of Act of Congress approved August 10, 1917, c. 53, 40 Stat. 276, which authorized the President, from time to time, to requisition foods, feeds, fuels, and other supplies necessary to the support and maintenance of the Army or Navy, or any other public use connected with the common defense, and to requisition, or otherwise provide, storage facilities for such supplies, and to ascertain and pay a just compensation therefor, where the President requisitioned

and took possession of certain land to provide storage facilities for supplies necessary to the support of the Army and other uses connected with the public defense, it was [fol. 69] there held in the absence of a stipulation to pay interest or a statute allowing it, none can be recovered against the United States upon unpaid accounts or claims, and that under the act under which the property was requisitioned from the railroad company for the public use on payment of just compensation, where no provision was made in respect of interest, just compensation being provided for by the Constitution, such right cannot be taken away by statute, the ascertainment being a judicial function, and that the compensation to which the owner was entitled is the full and perfect equivalent of the property taken, it resting upon equitable principles, and meaning substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken. The United States claimed in effect that the owner was entitled to no more than the value of the land, as of date of taking, to be paid at a later time, when ascertained, the owner being deprived of the land and its use since the taking, May 23, 1919. In the opinion it is said:

"The owner's right does not depend on contract, express or implied. A promise to pay is not necessary. None is alleged. * * * The only question here is whether payment at a subsequent date of the value of the land as of the date of taking possession is sufficient to constitute just compensation. * * *

"The case of United States v. Rogers, 255 U. S. 163, is a condemnation case, and it was held that the owner was entitled as a part of the just compensation to interest on the confirmed award of the commissioners from the time when the United States took possession. The land was situated in New Mexico, and the proceedings were had under the Conformity Act of August 1, 1888, c. 728, 25 Stat. 357. Interest was allowed, not by virtue of state statute, but as constituting a part of the just compensation safeguarded by the Constitution. Speaking for the court, Mr. Justice Day said: 'Having taken the lands of the defendants in error, it was the duty of the Government to make just compensation as of the time when the owners were deprived of their property.'

"* * * the owner's right to just compensation cannot be made to depend upon state statutory provisions. The

trial, beginning at the bottom of page 15 of the record, and continuing over through page 16.

[fol. 82] The journal entry overruling defendant's motion for new trial on page 17.

Assignment of Errors I on page 19; Assignment of Errors III on pages 19-20; all of the rest of page 20; first paragraph on page 21, and Assignment of Errors X and XI on page 21.

Orders extending time to prepare and file bill of exceptions as appearing on page 22.

Paragraph 1 of defendant's amendments to assignment of errors, appearing on page 23.

Paragraphs 4 and 7 of defendant's amendments to assignment of errors, appearing on pages 24 and 25.

The first paragraph on page 26 of the record.

The last line of page 54, all of page 55 and the first paragraph on page 56.

All of the journal entry overruling defendant's motion for new trial, as set out on page 56, except the statement at the heading thereof that "said motion for new trial was denied by the court."

All of the stipulation as to the correctness of bill of exceptions, beginning at the bottom of page 56, and concluding on page 57.

All of stipulation for transcript of record, beginning at bottom of page 57, all of page 58, and all of page 59.

The foregoing stipulation is entered into by and between the parties in accordance with the provisions of Paragraph 8 of Rule No. 38 of the Supreme Court of the United States.

Thomas M. Liffard, Attorney for Petitioner. Robert H. Jackson, Solicitor General.

May, 1939.

[fol. 83] [File endorsement omitted.]

[fol. 84] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 17, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter Thomas M. Lillard. File No. 43,205, U. S. Circuit Court of Appeals, Tenth Circuit, Term No. 14. The Board of County Commissioners of the County of Jackson, in the State of Kansas, etc., Petitioner, vs. The United States of America, etc. Petition for a writ of certiorari and exhibit thereto. Filed March 3, 1939. Term No. 14, O. T., 1939.

Constitution safeguards the right * * *. The rule above referred to that in the absence of agreement to pay or statute allowing it the United States will not be held liable for [fol. 70] interest on unpaid accounts and claims, does not apply here. The requirement that 'just compensation' shall be paid is comprehensive and includes all elements and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation. * * * he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added. The legal rate of interest, as established by the South Carolina statute was applied in this case. This was a 'palpably fair and reasonable method of performing the indispensable condition to the exercise of the right of eminent domain, namely, of making "just compensation" for the land as it stands at the time of taking.' United States v. Sargent (C. C. A., Eighth Circuit,) 162 Fed. 81, 84.

"The addition of interest allowed by the District Court is necessary in order that the owner shall not suffer loss and shall have 'just compensation' to which he is entitled."

The Federal Judiciary Act of 1789, Section 34, c. 20, 28 U. S. C., Section 725, provides:

"'The laws of the several states, except where the *Constitution, treaties or statutes* of the United States otherwise require or provide, shall be regarded as rules of decisions in trials at common law, in the courts of the United States, in cases where they apply.'" (Italics supplied.)

In Erie R. Co. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. Rep. 417, 82 L. ed. 787, the court held:

"Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. * * * There is no federal general common law."

Appellant complains of the failure of the trial court to subject the United States to the statutory bar of the Kansas Cash Basis Law, invoking the pronouncement in Erie R. Co. v. Tompkins, supra.

This being a suit by the United States government in its [fol. 71] sovereign capacity and as guardian of its Indian

wards to carry out its obligations and to protect the Indian lands which by the Federal Constitution, acts of Congress, including its treaties with Indians, and by the terms of the admission of the State of Kansas into the Union,[9] is a field in which the federal power is both supreme and exclusive. Worcester v. Georgia, 6 Pet. 515.

The same contention here advanced was put forth by other counties of the State of Kansas in early cases involving attempts by the counties[10] to tax Indian lands held in severalty.

In The Kansas Indians (the Blue-Jacket case), 5 Wall. 737, the court said:

"If the Indians are under the control of Congress, from necessity there can be no divided authority. If they have outlived many things, they have not outlived the protection afforded by the Constitution, treaties, and laws of Congress. It may be that they cannot exist much longer as a distinct people in the presence of the civilization of Kansas, 'but until they are clothed with the rights and bound to all the duties of citizens' they enjoy the privilege of total immunity from State taxation. There can be no question of State sovereignty in the case, as Kansas accepted her admission into the family of States on condition that the Indian rights should remain unimpaired and the general government at liberty to make any regulation respecting them, their lands, property, or other rights, which it would have been competent to make if Kansas had not been admitted into the Union."

Complaint is also made as to the trial court's refusal to instruct the jury that under the Kansas Cash Basis Law, unless the appellee had filed with the Board of County Commissioners of Jackson County on May 15, 1933, a claim for

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[9] Act of Congress, Jan. 29, 1861, Vol. 7, Thorpe's American Charters, Constitutions and Organic Laws, 1492-1908, Government Printing Office, (1909).

[10] Blue Jacket, et al. v. Board of Com'rs, County of Johnson, Kansas; 72 U. S. (5 Wall.) 737, 18 L. Ed. 667; Yellow Beaver, et al. v. Board of Com'rs, County of Miami, 72 U. S. (5 Wall.), 757, 18 L. Ed. 673; Wan-Zop-E-Ah, et al. v. Board of Com'rs of County of Miami, 72 U. S. (5 Wall.), 759, 18 L. Ed. 674.

the taxes paid prior to April 30 of that year, the appellee is not entitled to recover the taxes paid prior to that date. The [fol. 72] specific provision of the Kansas act relied upon by the appellant provides:

"* * * all claims not presented as above provided (except unliquidated claims for damages) shall be barred and shall no longer constitute a valid and existing indebtedness of the municipality." (G. S. Kansas, 1935, 10-1104.)

This is merely a statute of limitations. Levant Consolidated Dist. v. Colby Comm. High School, 140 Kan. 561, 38 Pac. (2d) 684. Neither a general nor specific statute of limitations is applicable in a suit of this type. Board of County Com'rs of Osage County, Oklahoma, et al. v. United States, (10th Cir.), 64 Fed. (2d) 775, 776; Board of Com'rs of Caddo County, Okl. v. United States, (10th Cir.), 87 Fed. (2d) 55, 57; Board of County Com'rs of Tulsa County, Okl. v. United States, (10th Cir.), 94 Fed. (2d) 450; and McGannon v. Straightledge, 32 Kan. 524.

Then further contention by appellant is that under the Kansas decisions a county is not liable for interest in the absence of a statute expressly providing for its allowance. Jackson County v. Kaul, 77 Kan. 715, 96 Pac. 45. The same is the rule in Oklahoma: Eaton v. St. Louis-S. F. Ry. Co., 122 Okla. 143, 251 Pac. 1032; (1927); Brown v. Board of Education, 148 Okla. 97, 298 Pac. 249 (1931); and Board of County Com'rs v. City of Marlow, 148 Okla. 126, 298 Pac. 255 (1931).

Recovery cannot be limited by state statute or decision when it would operate to deprive the United States and its Indian wards of the full restitution or compensation to which they are entitled under the Fifth or Fourteenth Amendments to the Constitution of the United States. Ward v. Love County, supra, page 24; and Board of Supervisors of Mercer County, v. Cowles, 74 U. S. (7 Wall.) 118, 19 L. Ed. 86.

The sovereign immunity of a state does not extend to its counties for they may be sued in the absence of express consent. Lincoln County v. Luning, 133 U. S. 529, 10 Sup. Ct. Rep. 363; Board of Supervisors of Mercer County v. Cowles, supra; and Ward v. Love County, supra.

All contentions have been examined. The judgment of the lower court should be Affirmed.

[fols. 73-74] IN UNITED STATES CIRCUIT COURT OF APPEALS
JUDGMENT—December 10, 1938

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Kansas and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed; and that United States of America, appellee, have and recover of and from The Board of County Commissioners of the County of Jackson, in the State of Kansas, appellant, its costs herein.

[fol. 75] IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

[Title omitted]

PETITION FOR REHEARING—Filed January 9, 1939

To the United States Circuit Court of Appeals of the Tenth Circuit and the Judges thereof:

Comes now The Board of County Commissioners of the County of Jackson, in the State of Kansas, a body politic and quasi public corporation, the appellant in the above entitled cause, and presents this its petition for a rehearing of the above entitled cause, and in support thereof respectfully shows:

[fol. 76]

I

This court failed to give proper effect to the recent decision of the United States Supreme Court in the case of Erie R. R. Co. v. Tompkins, 82 L. ed. 787, decided April 25, 1938, in that the proper interpretation of that case in substance holds that in matters not governed by the federal constitution or acts of Congress, the law to be applied in any case is the law of the state.

II

Failure of the District Court to leave the question of what would constitute reasonable compensation to the jury. The

Judge of the District Court instructed the jury that if they find for the plaintiff, the plaintiff is entitled to six per cent interest.

III

This court failed to give proper effect to the acts of the Secretary of the Interior and the President of the United States in issuing a fee simple patent under proper authority from Congress. In view of the peculiar wording of this peace treaty, 25 U. S. C. A. 349 did properly "otherwise provide by law" within the meaning of the provisions of said treaty, wherein it is stated "* * * Until otherwise provided by law, such tracts shall be exempt from levy, taxation, or sale. * * *" (See Brief p. 27.)

IV

This court found that the plaintiff was entitled to recover.

V

This court failed to give effect to the peculiar wording of this Indian treaty. (See our brief, page 28.)

[fols. 77-78] Wherefore, upon the foregoing grounds it is respectfully urged that this petition for rehearing be granted, and that the judgment of the United States District Court, for the District of Kansas, be upon further consideration reversed.

Respectfully submitted, Warden L. Noe, Floyd W. Hobbs, John L. Hunt, George M. Brewster, Attorneys for Appellant.

CERIFICATE OF COUNSEL

We, counsel for the above named appellant, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

John L. Hunt, Geo. M. Brewster, Attorneys for Appellant.

[File endorsement omitted.]

[fols. 79-80] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING—January 23, 1939

This cause, came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

(On February 3, 1939, the mandate of the United States Circuit Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court.)

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 81] IN SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING RECORD—Filed May 26, 1939

It is hereby stipulated by and between counsel for the petitioner and counsel for the respondent in the above entitled case that the following portions of the transcript of the record as printed by the Clerk of the United States Circuit Court of Appeals for the Tenth Circuit when the above case was before that Court may be omitted from the record to be printed in the Supreme Court of the United States as being not essential to a consideration of the question there presented by a petition for certiorari:

All that part of page 6 down to the motion to make additional parties.

The motion for new trial as set out beginning on page 14, and concluding on page 15, substituting in lieu thereof the statement that "Motion for new trial was filed on December 18, 1937, and order of the court overruling the motion was filed March 25, 1938."

All of plaintiff's objections to the jurisdiction of the court to hear and determine defendant's motion for new

FILE COPY

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1938

No. 720 14

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JACKSON, IN THE STATE OF KANSAS, A BODY POLITIC AND QUASI PUBLIC CORPORATION, *PETITIONER*,

VS.

UNITED STATES OF AMERICA (M-KO-QUAH-WAH, ALLOTTEE No. 193, AN INCOMPETENT INDIAN OF THE PRAIRIE BAND OF POTTAWATOMIE INDIANS), *RESPONDENT*.

PETITION FOR A WRIT OF CERTIORARI REQUIRING THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT TO CERTIFY TO THE SUPREME COURT, FOR ITS REVIEW AND DETERMINATION, THE CASE OF THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JACKSON, IN THE STATE OF KANSAS, A BODY POLITIC AND QUASI PUBLIC CORPORATION, APPELLANT, VS. UNITED STATES OF AMERICA (M-KO-QUAH-WAH, ALLOTTEE No. 193, AN INCOMPETENT INDIAN OF THE PRAIRIE BAND OF POTTAWATOMIE INDIANS), APPELLEE, AND BRIEF IN SUPPORT THEREOF.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JACKSON, IN THE STATE OF KANSAS, A BODY POLITIC AND QUASI PUBLIC CORPORATION,
Petitioner.

DEAN SHRADER,
County Attorney of Jackson County, Kansas,

FLOYD W. HOBBS,
Of Counsel.

By THOMAS M. LILLARD,
Of Topeka, Kansas,
Counsel for Petitioner.

H. M. IVES & SONS, TOPEKA

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Cases Cited

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1938

No._____

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JACKSON, IN THE STATE OF KANSAS, A BODY POLITIC AND QUASI PUBLIC CORPORATION, *PETITIONER*,

VS.

UNITED STATES OF AMERICA (M-KO-QUAH-WAH, ALLOTTEE No. 193, AN INCOMPETENT INDIAN OF THE PRAIRIE BAND OF POTTAWATOMIE INDIANS), *RESPONDENT*.

PETITION FOR A WRIT OF CERTIORARI REQUIRING THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT TO CERTIFY TO THE SUPREME COURT, FOR ITS REVIEW AND DETERMINATION, THE CASE OF THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JACKSON, IN THE STATE OF KANSAS, A BODY POLITIC AND QUASI PUBLIC CORPORATION, APPELLANT, VS. UNITED STATES OF AMERICA (M-KO-QUAH-WAH, ALLOTTEE No. 193, AN INCOMPETENT INDIAN OF THE PRAIRIE BAND OF POTTAWATOMIE INDIANS), APPELLEE.

To the Honorable The Supreme Court of the United States:

The petition of The Board of County Commissioners of the County of Jackson, in the State of Kansas, a body politic and *quasi* public corporation, appellant, respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The United States of America instituted this action December 23, 1936, in the District Court of the United States for the District of Kansas under the direction of the Attorney General of the United States to recover a judgment against The Board of County Commissioners of Jackson County, Kansas, on account of taxes collected by said County during the years 1919-1933, inclusive, upon farm land in Kansas which had been allotted to a certain Indian under the General Allotment Act of February 8, 1887, c. 119 (24 Stat. 38, 25 U.S.C.A. 348). (For text of Act, see Appendix B.) The amount claimed in the petition was $3,073.70, being the principal amount of taxes paid by the Indian, plus accrued interest. The amount of taxes actually paid was $1,966.96, and the interest claimed amounted to $1,106.74, which made up the total prayed for as above stated.

The District Court entered judgment in favor of the plaintiff for the amount of $3,277.49, which included interest up to the 17th day of September, 1937, the date of the rendition of the judgment, together with interest thereafter at the rate of six per cent per annum until paid. An appeal was perfected to the Circuit Court of Appeals for the Tenth Circuit, in which the judgment of the District Court was affirmed. (Tr. 61-72.) A petition for rehearing was filed (Tr. 73), which was thereafter denied.

(1) The Sole Question Involved.

The action was apparently brought under the authority of Section 24 of the Judicial Code, Sub-section (1), as amended (28 U.S.C.A. 41 (1)). The authority of the United States to bring this action on behalf of the Indian, M-Ko-Quah-Wah,

is not challenged; nor is the correctness of the judgment of the District Court in permitting recovery of the principal amount of the tax money paid by the Indian to the County now a matter of issue here. The sole contention is that the District Court was in error in rendering judgment in favor of the United States and against The Board of County Commissioners of Jackson County, Kansas, *for interest* on the principal amount of the taxes collected from the Indian (Tr. 13-14), it having been stipulated by and between the parties that if recovery of such interest could be had it would be in the amount of $1,311.36. (Tr. 43.)

There are a number of Indian allottees in Jackson County, Kansas, from whom taxes have been collected in a manner similar to the taxes collected from the Indian, M-Ko-Quah-Wah, in the present case. The decision in this case will therefore determine as to whether many others, along with the Indian involved in this case, may collect interest on back taxes where a refund of tax payments is properly recoverable.

(2) The Allegations of the Petition.

The petition filed by the Government (Tr. 1 to 5, inc.) alleges that the land in Jackson County, Kansas, was allotted to the Indian in question; that on August 15, 1893, a trust patent was issued to her covering the premises in question under the Fifth Section of the General Allotment Act (see Appendix B) hereinbefore referred to; that in accordance with said Allotment Act the trust patent so issued provided that the land should be held by the Government for a period of twenty-five years in trust for the sole benefit and use of the Indian or her heirs; that at the expiration of said period the United States would convey the land by patent to the Indian or her heirs in fee, discharged of said trust and free from all charges or encumbrances whatsoever.

The petition of the Government further alleges that on April 17, 1918, a patent in fee was issued to the Indian without her consent, which on its face purported to convey the land in fee simple to the Indian allottee. The taxes sought to be recovered as set out in the petition of the Government were those paid for the years from 1919 to 1933, inclusive, in the total amount as hereinbefore stated.

The petition further alleges that the fee simple patent was cancelled by the Government on May 31, 1935, under authority of the Act of Congress approved February 26, 1927, 44 Stat. L. 1247, as amended by the Act of February 21, 1931, c. 271, 46 Stat. L. 1205 (25 U.S.C.A. 352a) (For text of Act, see Appendix D.)

(3) The Evidence.

The evidence shows that the Indian did not request the issuance of this fee patent; that the taxes were paid for her by her husband, or by the administrator of her husband's estate, from her funds, or funds that had been accumulated by herself and her husband from the land so patented to her. (Tr. 35-36-37.) The Government at no time during the litigation has contended that the taxes were paid by the Indian, or on her behalf, under formal protest as provided by statutes of the State of Kansas.

The evidence introduced on behalf of the Government shows that a Government Competency Commission investigated the allottee Indian in December of 1917, the year prior to the issuance of the fee patent referred to above. The report of this Commission (Tr. 29-30) shows that at that time the Indian and her husband had a well improved home, a large barn, wells, windmills, and other farm buildings; an automobile, ten or fifteen head of horses and mules, a large herd of cattle, including a bunch of thoroughbred

Galloways. The Commission concluded that the Indians were very competent people, and so advised the Office of Indian Affairs, which office, in turn, recommended that the fee patent be issued. (Tr. 30.) The County officials did not begin to levy taxes until the year after this fee patent was issued, and no taxes were levied or collected after the fee patent was cancelled.

B.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

1. The decision of the Circuit Court of Appeals for the Tenth Circuit in the present case, 100 F. 2d 929 (Tr. 61 to 72, inc.), as to the right of the Indian allottee to recover *interest* on taxes erroneously assessed and collected against her by the defendant, Jackson County, Kansas, is directly in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of *United States v. Nez Perce County, Idaho,* 95 F. 2d 232, and in direct conflict with a similar case in the same Circuit, entitled *United States v. Lewis County, Idaho,* 95 F. 2d 236, and in direct conflict with the decision of the United States Circuit Court of Appeals for the Ninth Circuit when both of the cases just referred to were before that Court on consolidated rehearing, as reported in 95 F. 2nd 238; also in direct conflict with the decision of the Ninth Circuit Court of Appeals in the case of *Glacier County, Montana, v. United States,* 99 F. 2d 733. The Circuit Court of Appeals for the Ninth Circuit in the aforesaid cases held upon facts practically identical with those existing in the present case that the Government was not entitled to recover *interest* on behalf of Indian allottees on taxes which had been paid to the defendant counties over a period of years. The decision of the Circuit Court of Appeals for the Tenth Circuit in this case is an erroneous decision, the de-

cisions of the Circuit Court of Appeals for the Ninth Circuit being the correct legal conclusion to be applied.

2. The decision of the Circuit Court of Appeals for the Tenth Circuit in the present case, as above referred to, as to the right of the Government to recover *interest* for an Indian allottee on taxes erroneously collected from her, by holding that such interest charges could be collected, is a decision on an important question of local law in a way which is in conflict with applicable local or state decisions.

3. The decisions of the Circuit Court of Appeals for the Tenth Circuit in the present case, as above referred to, by holding that *interest* may be recovered by the Government on behalf of an Indian allottee from a county, which is a political subdivision of a state, involves an important question of federal law which has not been, but which should be settled by this Court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and all proceedings of said Circuit Court had in the case numbered and entitled on its docket, No. 1728, *The Board of County Commissioners of the County of Jackson, in the State of Kansas, a body politic and quasi public corporation, Appellant, v. United States of America (M-Ko-Quah-Wah, Allottee No. 193, an Incompetent Indian of the Prairie Band of Pottawatomie Indians), Appellee,* to the end that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States, and that the judgment herein of said United States Circuit Court of Appeals be reversed by his Court, and for such further relief as to the court may seem proper.

Copies of the transcript of the record in this case in the Circuit Court of Appeals for the Tenth Circuit are filed herewith in conformity with Rule No. 38 of this Honorable Court.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JACKSON, IN THE STATE OF KANSAS, A BODY POLITIC AND QUASI PUBLIC CORPORATION,
Petitioner.

By THOMAS M. LILLARD,
Of Topeka, Kansas,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

THE OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit (Tr. 61-72), sought to be reviewed was handed down on December 10, 1938. It is reported in 100 F. 2d 929 (Advance Sheet No. 7). Petition for rehearing was filed in said Circuit Court of Appeals on January 9, 1939. (Tr. 75-77.) This petition was denied on January 23, 1939. (Tr. 79.)

II.

JURISDICTION

The ground on which the jurisdiction of this Court is invoked is the Judicial Code 240, as amended by Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938 (28 U.S.C.A. 347), providing for the issuance of writs of certiorari by the Supreme Court of the United States to review judgments of the Circuit Courts of Appeals.

III.

STATEMENT OF THE CASE

The nature of the case and the ruling of the Circuit Court of Appeals for the Tenth Circuit is set forth in the foregoing petition (Point A, pp. 2-5) which is adopted as a part of this brief.

IV.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals below erred:

1. In holding that the United States of America on behalf of M-Ko-Quah-Wah could recover *interest* on taxes which she paid to Jackson County, Kansas, during the time she held a fee patent from the Government to the land which was the subject of the taxes, and such holding is contrary to decisions of the Ninth Circuit Court of Appeals in cases practically identical in facts and circumstances.

2. In holding that the United States Government had the right to recover *interest* for an Indian allottee on taxes collected on Kansas land, which decision involves an important question on local law contrary to and in conflict with decisions of the Supreme Court of the State of Kansas.

V.

ARGUMENT.

Unless the Government is Held Entitled to Interest as a Strict Matter of Legal Right as by Force of Statute or Contract, it is in no Position to Demand Interest Payments From the County on Behalf of an Indian Allottee as Damages.

There is no statute in the State of Kansas which authorizes the collection of interest from a county. The Kansas Supreme Court holds that a county is a political subdivision of the State.

The Supreme Court of the State of Kansas in the case of *Jackson County v. Kaul*, 77 Kan. 717, 96 P. 45, held as follows, as shown by the syllabus of the case, as prepared by the Court:

"The general interest statute allowing creditors to receive in the absence of contract, interest upon money after it becomes due cannot be interpreted to impose a liability upon a county, which is a political subdivision of the state, organized for purely governmental purposes and endowed with *quasi*-corporate powers only; and, in an action against county officers to recover taxes wrongfully exacted over the protest of the taxpayer and through the compulsion of a tax warrant, interest on the money from the time it was paid (it then being due) cannot be recovered."

In the opinion, referring to the general statute of the State of Kansas which permits creditors to receive interest at the rate of six per cent per annum when no other rate of interest is agreed upon, for any money after it becomes due (Sec. 41-101, G.S. Kans. 1935), the court said:

"The word 'creditors' is here used in the broad sense of those who have the legal right to demand and receive the payment of money, and includes the plaintiff in the transaction under investigation. The money having been wrongfully extorted from the plaintiff by the threatened seizure of his property under the tax warrant then in the sheriff's hands for execution, the county had no right to retain it for a single day. It owed the plaintiff the duty to make restitution at once. (See 22 Cyc. 1506.) No demand was necessary, because the money had been exacted over the plaintiff's protest and denial of liability. Therefore the money was 'due' as soon as the county had taken it.

"So far the statute has been looked at from the creditor's side. Considered from the viewpoint of the debtor, it imposes a duty and a liability outside of contract which would not otherwise exist. Do its merely general terms extend to counties? The general rule that the state is not bound by statutes limiting rights and imposing burdens unless it be expressly named or be intended by necessary implication is familiar. (*The State v. Book*

Co., 69 Kan. 1, 24, 76 Pac. 411, and authorities there cited.) To bind the state by an implication it must be one that is unavoidable. If there be a doubt upon the subject, that doubt must be resolved in favor of the state. (*The State v. School District*, 34 Kan. 237, 242, 8 Pac. 208.)

"Counties are mere political subdivisions of the state. (*Commissioners of Shawnee County v. Carter*, 2 Kan. 115.) They are mere instrumentalities of the state in the exercise of its governmental functions, and are given corporate power only so far as may be necessary to aid those functions. They are only *quasi*-corporations (*Comm'rs of Neosho Co. v. Stoddart*, 13 Kan. 207, 210; *Freeland v. Stillman*, 49 Kan. 197, 207, 30 Pac. 235; *In re Dalton*, 61 Kan. 257, 264, 59 Pac. 336, 47 L.R.A. 380; *The State v. Wilson*, 65 Kan. 237, 238, 69 Pac. 172), and are clearly distinguished from municipal organizations like cities, which are given far greater powers and are endowed with much larger measures of corporate life. (1 Dill. Mun. Corp., 4th ed., No. 25; 11 Cyc. 341 *et seq.*) This suit can be maintained only because it relates to a subject which falls strictly within the limits of expressly granted authority. If it does not, the county cannot be sued any more than the state itself. When the statutes have made no distinction a county is entitled to the same privileges and immunities of the state."

As indicated, the collection of interest from the county was denied. As stated above, there is no other statute in Kansas which evidences the consent of that state to a recovery of interest upon tax money which has been collected erroneously.

In the case of *Salthouse v. McPherson County*, 115 Kans. 668, 224 Pac. 70, it is held:

"A judgment against a county in an action for the repayment of a void tax does not bear interest, the statute providing in general terms that judgments shall bear interest not applying where the state or county is the debtor."

In the opinion, 15 R.C.L., page 17, is cited. This text reads as follows:

> "It is well settled, both on principle and authority, that a state cannot be held to the payment of interest on its debts unless bound by an act of the legislature or by a lawful contract of its executive officers made within the scope of their duly constituted authority. This principle applies to bonds, claims, judgments, and warrants. The theory upon which the rule is based is that whenever interest is allowed either by statute or by common law, except in cases where there has been a contract to pay interest, it is allowed for delay or default of the debtor. But delay or default cannot be attributed to the government. It is presumed to be always ready to pay what it owes. The apparently favored position of the government in this respect has been declared to be demanded by public policy. A county is generally regarded as but an arm or agent of the state, and not liable for interest, in the absence of an express agreement to pay it."

This rule is also followed in the case of *School District v. County Commissioners*, 127 Kan 292, 273 Pac. 427, where it was held:

> "Interest may not be recovered from a county except through express provision of statute."

This, then, is the rule in Kansas concerning the collection of interest from counties, which, as is demonstrated by the case of *Jackson County v. Kaul, supra*, are regarded as instrumentalities of the state. The ruling of the highest court in Kansas is to the effect that there is no applicable statute in Kansas which authorizes the collection of interest on judgments for the refund of tax money erroneously collected.

A similar situation as to law exists in the State of Idaho. In that state there is a statute which allows interest on taxes

refunded after erroneous collection, but there is no statute of that state which evidences the consent of the state to a recovery of interest in a case such as is presented here. Under such a state of facts and circumstances, the United States Circuit Court of Appeals for the Ninth Circuit held that interest could not be recovered by the United States on behalf of an Indian ward living in Idaho. The facts there were practically identical to the facts in the present case. See *United States v. Nez Perce County, Idaho,* 95 F. 2d 232. On page 236 of the opinion in that case the following appears:

> "The recovery of interest on the amounts paid as taxes should not be allowed. *Interest may not be recovered upon money due from the sovereign unless some positive statute or contract of the state evidences its consent to pay it. United States v. North Carolina,* 136 U.S. 211, 10 S. Ct. 920, 34 L. Ed. 336; *United States v. North American Transp. & Trading Co.,* 253 U.S. 330, 336, 40 S. Ct. 518, 64 L. Ed. 935; *Seaboard Air Line R. Co. v. United States,* 261 U.S. 299, 304, 43 S. Ct. 354, 355, 67 L. Ed. 664. The county is a political subdivision of the state, and as such would seem to be entitled to this form of immunity. While the Code provision (section 61-1902, Idaho Code 1932) allows interest on taxes refunded after erroneous collection, the statute has no application in suits for refund brought in the federal courts. We are not aware of any statute of the State of Idaho which evidences the consent of that state to a recovery of interest in a situation such as the one presented here." (Italics ours.)

A rehearing was granted in that case on the sole contention that the court committed error in denying to the Government the recovery of interest. The opinion denying a rehearing is reported in 95 F. 2d 238, beginning on page 239 the court uses the following language:

"Unless the government is here entitled to interest as a strict matter of legal right, as by force of statute or contract, it is in no position to demand interest as damages. Its situation in that respect is conspicuously lacking in equity. The amended bills in these cases were filed in September, 1935. This was nine or ten years after the last payment of taxes had been made by the Indians, and the payments themselves had extended over a prior period of four or five years. Thus interest is sought on payments made as long as fourteen years before the commencement of the suits, and in no instance has the delay in seeking recovery been less than nine years. These delays are in no manner traceable to fault on the part of the counties or their governing officials, but are due to inexcusable laches on the part of the government itself. Again, the counties were in no way responsible for the issuance of the fee patents to the Indians in the first place. This was an act of the government itself, occasioned by facts and circumstances peculiarly within the knowledge of those representing it. The local authorities had a right to rely upon the conduct of the government in the issuance of the patents, and were by this conduct induced to believe that the lands were subject to tax. The good faith of the counties and of their officers and governing boards is not open to question. For many years their budgets were formulated and their levies were fixed on the assumption—certainly not an unreasonable one—that these patented lands were part of the whole body of property subject to tax. Were the rights of the United States alone to be considered in these cases, its conduct might properly be held to estop it from any recovery at all. Nor, as indicated in the original opinions, is there a showing in either case that the Indian paid the taxes under protest. We have held that the United States is not precluded on this account from recovering the principal of the tax, but it does not follow that the Indians, having paid the taxes without protest, are themselves equitably entitled to interest by way of damages because of the retention of the moneys so paid. Nor is

there any showing that the counties have earned or received interest on the moneys illegally exacted.

"Under all the circumstances, it is clear that the government is entitled to no more than a refund of the principal of these payments. The allowance of interest, even if normally recoverable, would be an abuse of discretion."

In the present case, the petition of the Government was filed on December 23, 1936, fifteen years after the first payment of taxes was made, and more than two years after the last item of taxes had been paid. Thus interest is sought on payments made as long as fifteen years before the commencement of the suit. As in the opinion last above quoted from, the delay in attempting to collect the taxes is in no manner traceable to fault, on the part of the county or its officers, but is due alone to the laches on the part of the Government. Also, as in the foregoing case, the county here was in no way responsible for the issuance of the fee patent to the Indian allottee. That was an act of the Government, the plaintiff in the case, occasioned and prompted by facts and circumstances which were peculiarly within the knowledge of the Government officials.

We submit the logic of the court in the above case, where it holds that under such a situation the local authorities had a right to rely upon the conduct of the Government in the issuance of the patent and that they are warranted in believing the lands were properly taxable, is sound. There was no evidence in this case which in any way questioned the good faith of the county officers, and there is nothing to show that they were arbitrary or unreasonable in making the tax levies against the property of the Indian in question. As in the foregoing case, they undoubtedly made their budgets and the levies were fixed upon the very reasonable assumption that these lands having been patented in fee by

the Government were subject to taxation. There is no showing in the case that the county has ever received interest on the tax moneys collected from the allottee in question. In fact, the evidence is directly to the contrary, in that it shows the county officials largely disbursed the money to state, townships and school districts, the county having been the collecting agency for those branches of the state government.

There are many Indians in Jackson County, Kansas, for whom the Government has not yet filed suit. If the interest rule as announced and found by the Circuit Court of Appeals for the Tenth Circuit is permitted to stand, many other large items of interest of this character will be charged to, and collected from Jackson County, Kansas. The county is rural in its characteristics. The farmers and few business men residing therein are in very low financial condition. If these citizens are required to pay interest on these ancient tax levies, which were occasioned by errors on the part of the Government in the issuance of fee patents to Indians, an extraordinary and unreasonable additional financial burden will be cast upon the Kansas citizens to the unreasonable advantage of Indian allottees. So far as the record in this case is concerned, the Indian here involved was, and is, financially well fixed. She was found by the Competency Commission sent out by the Government to be fully competent to handle her own affairs.

The Circuit Court of Appeals for the Tenth Circuit in the present case in its opinion (Tr. 61-72) cites authorities which are not appropriate to the conclusion ultimately reached by the court on the question of interest. Condemnation cases, and cases where food, fuel and supplies were requisitioned by the government are cited. But the authorities make a distinction between cases where property has been taken and compensation is claimed under the Fifth Amend-

ment to the United States Constitution, and cases in which refunds of tax moneys are sought. See *Flemming v. County Commissioners*, 119 Kan. 598, 602, 240 Pac. 591; *Seaboard Air Line R. Co. v. U. S.*, 261 U.S. 299, 304, 43 S. Ct. 354, 355, 67 L. Ed. 664.

In the opinion in the present case the Circuit Court of Appeals cites Section 34 of the Federal Judiciary Act of 1789, 28 U.S.C.A., Sec. 351, which provides that the laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, the inference from such citation being that the rights in question in the present action are governed by provisions of the Federal Constitution, treaties or statutes. However, there are no constitutional provisions or statutes, or provisions of the treaty involved in the present case (Articles 2 and 3 of Treaty of November 15, 1861 [12 Stat. 1191. See Appendix A]) which require the payment of interest by states or subdivisions of states where taxes are erroneously collected. We are conceding the correctness of the opinion of the District Court in granting a refund of the principal amount of taxes paid. That is as much as the treaty involved in this case contemplates. It simply says that the land shall be free from taxation. If the taxes are refunded, it will be free from taxation. There is nothing in the treaty which says that interest may also be charged. The Circuit Court of Appeals in the opinion in the present case attempts to distinguish the case of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 417, 82 L. Ed. 787, by referring particularly to the exception as announced in the Federal Judiciary Act referred to above. The quotation in the opinion from the Erie case in that respect is as follows:

> "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. * * * There is no federal general common law."

Apparently the Circuit Court of Appeals takes the view that the exception just quoted fits the present situation, but there are no federal constitutional provisions or federal statutes which authorize the collection of interest in cases of this character. From this it is apparent that the conclusion of the Tenth Circuit Court of Appeals in support of its decision as to the interest item is not sustained by the clear logic and reasoning that was adduced by the Ninth Circuit Court of appeals in the Idaho and Montana cases above referred to.

As a matter of fact, the judgment of the Circuit Court of Appeals for the Tenth Circuit in this case does not even agree with two prior judgments in almost identical cases as decided by District Judges within the same Circuit. In the case of *United States v. Board of Commissioners of Comanche County, Oklahoma*, 6 F. Supp. 401, District Judge Vaught decided in a case almost identical in its facts with the case now before the court that interest could not be recovered on the taxes sued for. The taxes in that case were paid under protest. The court in that opinion, on page 403, states:

> "Where taxes are paid under protest, the collecting authority can only hold them in trust, and since Comanche County would be regarded in this case as a trustee, this court knows of no provision for the payment of interest except by taking the interest from some other fund whose application had been provided by statute."

Judgment was thereupon entered for the amount of the taxes without interest.

Later, the District Court of Oklahoma in the case of *United States v. Board of County Commissioners of Pawnee County,*

Oklahoma, 13 F. Supp. 641, in an opinion written by Judge Kennamer, reached a conclusion in another case exactly in line with the case now before this court, that interest could not be collected. The taxes in that case were not paid under formal protest, but the court held that the judgment for the Indian plaintiff should not carry interest.

These decisions are in line with the case of *Kittredge v. Boyd,* 137 Kan. 241, 20 P. 2d. 811. Beginning on page 243 of the opinion; it is said:

> "That is the question whether interest should be paid on the protested sums during the time the state treasurer has held them pending an authoritative adjudication on the legality of the statute. In our opinion the state treasurer served as official stakeholder for all parties concerned. He has no fund to pay interest. While we have held that plaintiffs had no adequate remedy at law, and in consequence they could rightfully bring mandamus in these cases, mandamus was not the only extraordinary procedural redress—an injunction or mandatory injunctive proceeding in the district court, and could thereby have procured an adjudication on the state's claim to these illegal tax exactions without having paid over the money at all. The procedure they did follow was simpler and more expeditious, but it does not entitle them to interest on their funds while they have been in the hands of the state treasurer."

Thus it is that as against cases of exact similarity the decision here of the Circuit Court of Appeals for the Tenth Circuit stands out alone, and unsupported by other federal authorities. The court was clearly in error in holding that interest charges could be properly collected on the taxes paid by the Indian allottee.

Another very late case by the Ninth Circuit Court of Appeals where the facts are practically identical with the facts in the present case is that of *Glacier County, Montana, v. United*

States, 99 F. 2d 733. That was an action by the Government on behalf of an Indian ward to recover taxes which had been assessed and collected during the time when the trust period as provided by the General Allotment Act of 1887 was still running. The court adhered to its earlier decisions cited hereinbefore in holding that while the taxes should be refunded to the Indian, interest could not be collected from the County. This decision was handed down on October 15, 1938, indicating the clear intent of the United States Circuit Court of Appeals for the Ninth Circuit to adhere to its earlier decisions, and to regard the holding of no interest liability as established law.

This being a brief in support of petition for a writ of certiorari, rather than on the complete case, we will not go further than to suggest the foregoing shows conclusively that the exact reasons for the granting of certiorari as set out in Rule 38 of this court, are present here as follows:

First: The Circuit Court of Appeals for the Tenth Circuit has rendered a decision in the present case directly in conflict and irreconcilable to the decisions of the Circuit Court of Appeals for the Ninth Circuit in the cases of *United States v. Nez Perce County, Idaho*, and *United States v. Lewis County, Idaho, supra*, where the identical question as to the right of recovery of interest was involved. Both courts, as shown by the opinions, have given careful consideration to the question, reaching directly opposite conclusions; both courts cite decisions of this court in support of their decisions. The opinion of the Tenth Circuit Court of Appeals requires the county to pay interest on tax moneys, some of which was collected as much as fifteen years prior to the date of the bringing of the suit. The total interest charges amount to almost as much as the principal amount of the taxes paid. The opinion of the Ninth Circuit Court of Appeals holds that outside and beyond the fact that interest may not be

collected as a matter of law, to require such a payment would work a grave inequity against the court and that interest may not therefore be collected as damages. Thus there is a direct conflict, and it is apparent that the Circuit Court of Appeals for the Ninth Circuit reached the correct result.

Second: The decision of the Circuit Court of Appeals for the Tenth Circuit in the present case requiring the payment of interest is a decision on an important question of local law, which is contrary to and in conflict with the laws of the State of Kansas in which the land in question is situated, and where the case was filed and tried in the Federal District Court. The rule announced in the case of *Erie R. Co. v. Tompkins, supra*, requires that the law of the state must be applied where the Federal Constitution, Federal Statutes or Federal Treaties do not provide to the contrary. We submit the rule announced by the state court as shown heretofore is not contradictory to any provisions of the Federal Constitution, Federal Statutes or of any Federal Treaty involved in this case and that it should control.

CONCLUSION

It is a serious matter when Circuit Courts of Appeal reach different conclusions on identical situations. It leaves the law in such an unsettled condition that litigants may not know their rights. This case also presents a serious situation to Jackson County, Kansas, a rural community, whose indebtedness to Indians will be nearly doubled if the erroneous ruling announced by the Tenth Circuit Court of Appeals is adhered to. It results also in a very apparent discrimination against Indians in the Idaho jurisdiction, in that they are not permitted to recover interest on taxes erroneously assessed and collected from them; whereas, if the present ruling

is permitted to stand, the Kansas Indians will have that advantage. Over and above this, it works a grave inequity where the county was misled by a mistake on the part of the Government in issuing a fee patent, which was not cancelled until after the last portion of taxes which are the subject of this litigation had been collected. The Indian in question here, as found by the Competency Commission, is capable of attending to her own affairs as is demonstrated by her financial soundness. It will afford her an unneeded advantage to the grave detriment of the taxpayers of Jackson County. These considerations demonstrate that two very distinct grounds for the granting of certiorari as set out in Rule 38 of this court, are readily available here.

It is, therefore respectfully submitted that this cause is one calling for the exercise by this court of its supervisory powers in ordering that the decree and opinion of the United States Circuit Court of Appeals for the Tenth Circuit may be examined, and to such end a writ of certiorari should be granted, and that this court should review the opinion of said Circuit Court of Appeals and reverse it.

Respectfully submitted,

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JACKSON, IN THE STATE OF KANSAS, A BODY POLITIC AND QUASI PUBLIC CORPORATION,
Petitioner.

By THOMAS M. LILLARD,
Counsel for Petitioner.

APPENDIX

A

Articles 2 and 3 of the Treaty of November 15, 1861 (12 Stat. 1191):

ARTICLE 2. It shall be the duty of the agent of the United States for said tribe to take an accurate census of all the members of the tribe, and to classify them in separate lists, showing the names, ages, and numbers of those desiring lands in severalty, and of those desiring lands in common, designating chiefs and head-men, respectively; each adult choosing for himself or herself, and each head of a family for the minor children of such family, and the agent for orphans and persons of an unsound mind. And thereupon there shall be assigned, under the direction of the Commissioner of Indian Affairs, to each chief at the signing of the treaty, one section; to each head-man, one-half section; to each other head of a family, one-quarter section; and to each other person eighty acres of land, to include, in every case, as far as practicable, to each family, their improvements and a reasonable portion of timber, to be selected according to the legal subdivision of survey. When such assignments shall have been completed, certificates shall be issued by the Commissioner of Indian Affairs for the tracts assigned in severalty, specifying the names of the individuals to whom they have been assigned, respectively, and that said tracts are set apart for the perpetual and exclusive use and benefit of such assignees and their heirs. Until otherwise provided by law, such tracts shall be exempt from levy, taxation, or sale, and shall be alienable in fee or leased or otherwise disposed of only to the United States, or to persons then being members of the Pottawatomie tribe and of Indian blood, with the permission of the President, and under such regulations as the Secretary of the Interior shall provide, except as may be hereinafter provided. And on receipt of such certificates, the person to whom they are issued

shall be deemed to have relinquished all right to any portion of the lands assigned to others in severalty, or to a portion of the tribe in common, and to the proceeds of sale of the same whensoever made.

ARTICLE 3. At any time hereafter when the President of the United States shall have become satisfied that any adults, being males and heads of families, who may be allottees under the provisions of the foregoing article, are sufficiently intelligent and prudent to control their affairs and interests, he may, at the request of such persons, cause the lands severally held by them to be conveyed to them by patent in fee-simple, with power of alienation; and may, at the same time, cause to be paid to them, in cash or in the bonds of the United States, their proportion of the cash value of the credits of the tribe, principal and interest, then held in trust by the United States, and also, as the same may be received, their proportion of the proceeds of the sale of lands under the provisions of this treaty. And on such patents being issued and such payments ordered to be made by the President, such competent persons shall cease to be members of said tribe, and shall become citizens of the United States; and thereafter the lands so patented to them shall be subject to levy, taxation, and sale, in like manner with the property of other citizens: *Provided*, That, before making any such application to the President, they shall appear in open court in the district court of the United States for the district of Kansas, and make the same proof and take the same oath of allegiance as is provided by law for the naturalization of aliens, and shall also make proof to the satisfaction of said court that they are sufficiently intelligent and prudent to control their affairs and interests, that they have adopted the habits of civilized life, and have been able to support, for at least five years, themselves and families.

B

Section 5 of the General Allotment Act of February 8, 1887, c. 119 (24 Stat. 38, 25 U. S. C., Sec. 348):

Upon the approval of the allotments provided for in sections 331 to 334, inclusive, and 336 by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. * * *

C

Act of May 8, 1906, c. 2348 (34 Stat. 182, 25 U. S. C., Sec. 349):

At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; * * * and thereafter all restrictions as to sale, encumbrance, or taxation of said land shall be removed * * *.

D

Act of February 26, 1927, c. 215 (44 Stat. 1247) as amended by the Act of February 21, 1931, c. 271 (46 Stat. 1205, 25 U. S. C., Sec. 352a):

The Secretary of the Interior is hereby authorized, in his discretion, to cancel any patent in fee simple issued to an Indian allottee or to his heirs before the end of the period of trust described in the original or trust

patent issued to such allottee, or before the expiration of any extension of such period of trust by the President, where such patent in fee simple was issued without the consent or an application therefor by the allottee or by his heirs: *Provided*, That the patentee has not mortgaged or sold any part of the land described in such patent: *Provided also*, That upon cancellation of such patent in fee simple the land shall have the same status as though such fee patent has never been issued.

BRIEF OF PETITIONER

Supreme Court of the United States

October Term, 1939

No. 14

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JACKSON, IN THE STATE OF KANSAS, A BODY POLITIC AND QUASI PUBLIC CORPORATION, *PETITIONER,*

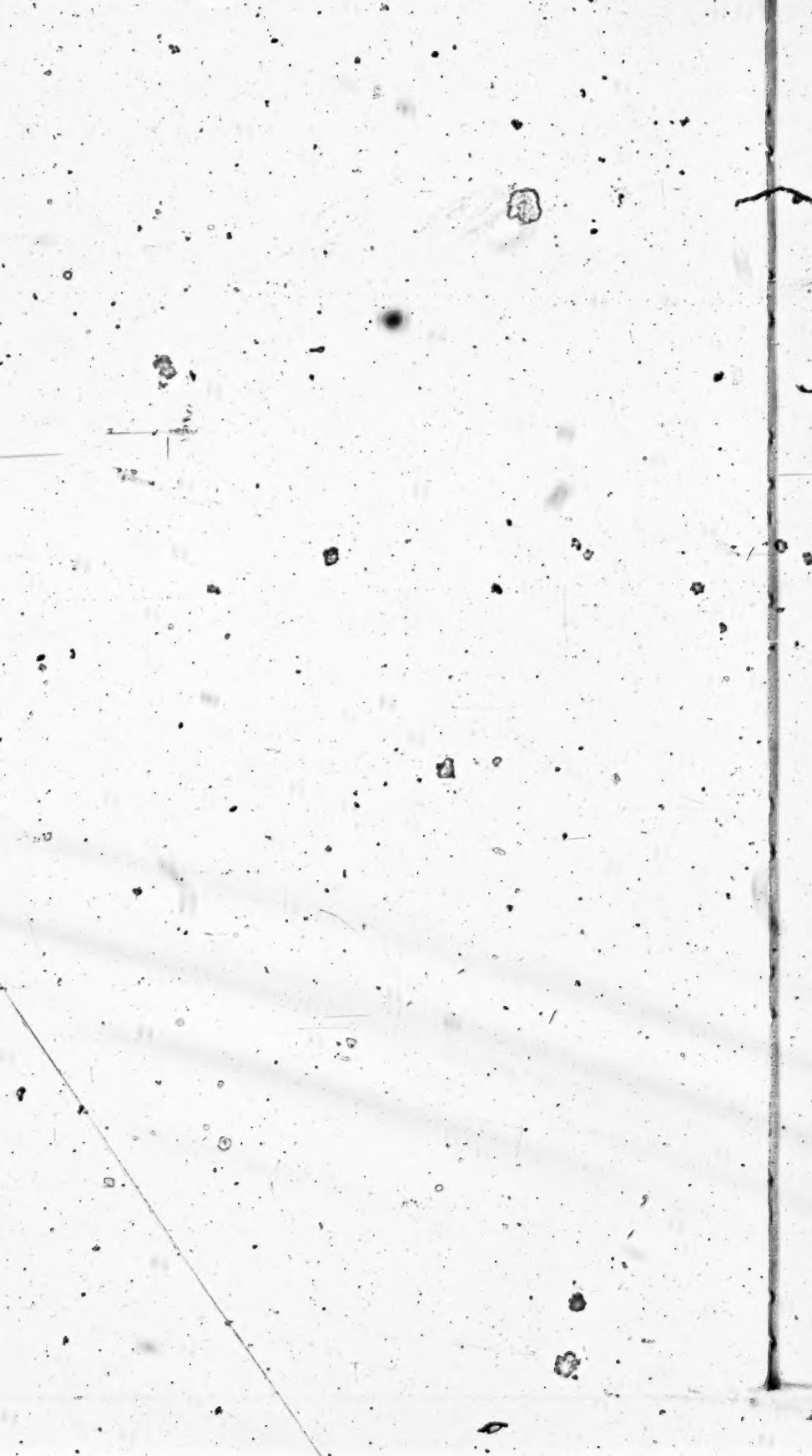
VS.

UNITED STATES OF AMERICA (M-KO-QUAH-WAH, ALLOTTEE No. 193, AN INCOMPETENT INDIAN OF THE PRAIRIE BAND OF POTTAWATOMIE INDIANS), *RESPONDENT.*

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JACKSON, IN THE STATE OF KANSAS, A BODY POLITIC AND QUASI PUBLIC CORPORATION,
Petitioner,
By THOMAS M. LILLARD,
Of Topeka, Kansas,
Counsel for Petitioner.

O. B. EIDSON,
DEAN SHRADER,
County Attorney of Jackson County, Kansas,
FLOYD W. HOBBS,
Of Counsel.

H. M. IVES & SONS, TOPEKA



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UNITED STATES OF AMERICA, (M-KO-QUAH-WAH, ALLOTTEE, No. 193, AN INCOMPETENT INDIAN OF THE PRAIRIE BAND OF POTTAWATOMIE INDIANS), *RESPONDENT*.

BRIEF OF PETITIONER

JURISDICTION

The jurisdiction of this court in this case is invoked under authority of the Judicial Code, Sec. 240, as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938 (28 U.S.C.A. 347). Petition for *certiorari* under authority of the foregoing section was filed within time, and was granted by this court on April 17, 1939, the respondent having joined with the petitioner in a request upon the court that certiorari be granted.

STATEMENT OF THE CASE

The United States of America instituted this action on December 23, 1936, by a petition filed in the District Court of the United States for the District of Kansas (Tr. 1-5), under the direction of the Attorney General of the United States to recover a judgment against the Board of County Commissioners of Jackson County, Kansas, for a recovery of taxes and interest collected by said County during the years 1919 to 1933, inclusive, upon farm land in Kansas which had been allotted to the Indian M-Ko-Quah-Wah, Allottee No. 193, an incompetent Indian of the Prairie Band of Pottawatomie Indians. This land had been allotted under the General Allotment Act of February 8, 1887, c. 119 (24 Stat. 38, 25 U.S.C.A. 348). For the pertinent provisions of the Act in question see Appendix B to this brief.

The amount claimed in the petition so filed was $3,073.70, being the principal amount of taxes paid by the Indian Allottee during the years above referred to. The total amount of taxes actually paid to the County by the Allottee during the period in question amounted to $1,966.96. In addition to this, the petition claimed interest on the taxes paid in the amount of $1,106.74, which made up the total above stated. The District Court entered judgment in favor of the plaintiff in the amount of $3,277.49 (Tr. 12-13), which included interest up to the 17th day of September, 1937, the date of the rendition of the judgment, together with interest thereafter at the rate of six per cent per annum upon the total amount of the judgment until paid.

An appeal was perfected to the Circuit Court of Appeals for the Tenth Circuit. After full presentation and hearing of the appeal, the Circuit Court affirmed the judgment of the District Court, its opinion being set out on pages 48 to 62, inclusive, of the transcript. The judgment of the Circuit Court is found on page 63 of the transcript in this court. Petition for rehearing was filed within time (Tr. 63-64).

which was denied by the Circuit Court of Appeals on January 23, 1939. (Tr. 65). As stated hereinbefore, this court granted petition for *certiorari* on April 13, 1939 (Tr. 66-67), the Solicitor-General having joined with the petitioner in an application that petition for *certiorari* be granted.

The petitioner here does not challenge the correctness of the judgment of the courts below that the principal amount of the taxes paid by the Indian Allottee during the years in question should be recovered from the county, petitioner herein. The sole contention which we bring to the attention of this court is that the District Court and the Circuit Court of Appeals were in error in rendering judgment in favor of the United States on behalf of the Indian Allottee in question, and against the Board of County Commissioners of Jackson County, Kansas, for interest on the principal amount of the taxes collected from the Indian during the years in question, as shown by the journal entry of the trial court. (Tr. 12-18.)

The petition filed by the Government in the District Court (Tr. 1-5) alleges that the land in Jackson County was allotted to the Indian in question; that on August 15, 1893, a trust patent was issued to her covering the premises in question under the Fifth Section of the General Allotment Act (see Appendix B) hereinbefore referred to; that in accordance with said Allotment Act the trust patent so issued provided that the land should be held by the Government for a period of twenty-five years in trust for the sole benefit and use of the Indian or her heirs; that at the expiration of said period the United States would convey the land by patent to the Indian or her heirs in fee, discharged of said trust and free from all charges or encumbrances whatsoever.

The petition filed in the District Court by the Government further alleges that on April 17, 1918, a patent in fee was issued to the Indian in question without her consent, which on its face purported to convey the land in fee simple to her. The taxes sought to be recovered, as set out in the

petition of the Government, were those paid for the years 1919 to 1933, inclusive, in the total amount hereinbefore stated. For an itemized statement of the taxes collected by the petitioner, together with interest computed to September 1, 1936, see page 4 of the transcript.

The petition further alleges that the fee simple patent was cancelled by the Government under the authority of an Act of Congress approved February 26, 1927, 44 Stat. L. 1247, as amended by the Act of February 21, 1931, c. 271, 46 Stat. L. 1205 (25 U.S.C.A. 352a.) (For text of Act, see Appendix D.)

THE EVIDENCE

The evidence was that the taxes in question were paid by the allottee, her husband, or by the administrator of her husband's estate beginning with the year 1919 to and through the year 1933. (Tr. 27.) The Government has not at any time throughout this litigation contended that the taxes were paid by the allottee or on her behalf under formal protest as provided by the statutes of the State of Kansas. There was one payment made under protest on account of a school district levy (Tr. 27), but this could not be construed in any way as being a protest to the validity of the taxes on the grounds advanced by the Government in this case.

The evidence introduced on behalf of the Government shows that a trust patent was issued to the allottee by the Government on August 15, 1893. (Tr. 20-21.) This patent provided that the Government would hold the land in trust for the allottee for a period of 25 years; that at the expiration of that period the United States would convey the land by patent to the Indian, free and clear of any charge or encumbrances, but provided that the President of the United States might, in his discretion, extend the period. In December of 1917, during the twenty-fourth year of the trust period as contemplated by the trust patent above referred to, a Competency Commission went out to the Potta-

watomie Indian Reservation where the land in question was located in Kansas, and made an investigation as to the financial condition of the allottee in question, and the competency of herself and her husband. The report of this Commission directed to the Secretary of the Interior under date of December 29, 1917 (Tr. 22), shows that at that time the allottee and her husband had a well improved home, a large barn, wells, windmills, and other farm buildings; an automobile, ten or fifteen head of horses and mules, a large herd of cattle, including a bunch of thoroughbred Galloways. The Government officials making this investigation ended their report by saying:

> "They are considered very competent people. This allottee declined to sign an application, but is deemed to be fully competent to transact his own business without further Government supervision."

This advice was forwarded to the Secretary of the Interior, with recommendations that the Commissioner of the General Land Office should be directed to issue a patent in fee to the allottee in question "and that the issuance of the patent be made special." (Tr. 22.)

On February 13, 1918, still during the twenty-fifth year of the trust period above referred to, the Secretary of the Interior acted upon this recommendation by concurring with the Competency Commission, and directing the Commissioner of the General Land Office to issue a patent to the land in question to the allottee, and directing "that the issuance of this patent be made special." (Tr. 23.)

Pursuant to this direction from the Secretary of the Interior a fee patent was issued by the Government to the allottee in question on April 17, 1918, being duly signed on behalf of the President by his Secretary. (Tr. 23-24.)

It is to be remembered at this point that the original trust patent was issued on August 15, 1893, and that the 25-year period provided in such patent would expire on August 15,

1918. Hence, the patent just referred to, signed by President Wilson, being issued under special directions from the Assistant Secretary of the Interior, and dated April 17, 1918, was issued only four months prior to the full expiration of the 25-year period.

Thereafter, and notwithstanding the issuance of this patent, the President, on July 30, 1918, extended the trust period as provided in the trust patent for a period of ten years. (Tr. 21.) This was done apparently notwithstanding the fact that the same President had theretofore ended the trust period provisions in the trust patent by a special patent issued after full investigation at the direction of the Secretary of the Interior. Another executive order again extending the trust period in the original trust patent for an additional ten years was issued by President Coolidge on April 16, 1928. This was also done notwithstanding the special patent which had been issued by President Wilson just prior to the full expiration of the 25-year trust period. (Tr. 21.)

On May 8, 1906, Congress passed an Act (34 Stat. 182, 25 U. S. C. Sec. 349) which provided that at the expiration of the trust period, "and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348" (set out in Appendix C hereto), then and thereafter all restrictions as to taxation of the land in question should be removed.

On February 26, 1927, Congress passed another Act (c. 215, 44 Stat. 1247), as amended by the Act of February 21, 1931 (c. 271, 46 Stat. 1205, 25 U.S.C., Sec. 352a). This act is set out as Appendix D hereto. By this act the Secretary of the Interior was authorized, in his discretion, to cancel any patent in fee simple issued to an Indian allottee or to his heirs before the end of the period of trust described in the original trust patent or before the expiration of any extension of such period of trust by the President, where such patent in fee simple was issued without the consent or application of the allottee.

Acting pursuant to this act, the office of Indian Affairs recommended to the Secretary of the Interior that the patent issued by President Wilson on April 17, 1918, to the allottee in question should be cancelled under the provisions of the last referred to act. This recommendation was made on May 20, 1935. (Tr. 25.) The recommendation was approved by the Secretary of Interior, and an order was issued on May 31, 1935, cancelling the fee simple patent. (Tr. 25-26.)

The evidence shows that the county officials did not begin to levy taxes until the year 1919, which was the year following the time the fee patent was issued by President Wilson, and no taxes were levied or collected by the county officials after the fee patent was cancelled on May 31, 1935.

THE TREATY AND LAWS

The Treaty and Federal statutes under which the foregoing procedure was taken have been referred to in connection with the statement made concerning the evidence. Nothing, however, was said concerning the original treaty between the Government and the Pottawatomie Indian Tribe, and it is thought reference to that treaty and further reference to the statutes might be helpful to the Court.

The original Treaty between the Government and the Pottawatomie Indians is dated November 15, 1861 (12 Stat. 1191). For Articles 2 and 3 of this Treaty see appendix A. Article 2 of that Treaty provided for the selection and allotment, or assignment, to the Indians of tracts of land; that when such assignments had been made, certificates should issue to the Indians and the tracts should be set apart for the perpetual use of the land by the assignees and their heirs. The Treaty also provided:

> "Until otherwise provided by law, such tracts shall be exempt from levy, taxation, or sale, and shall be alienable in fee or leased or otherwise disposed of only to the United States, or to persons then being members of

the Pottawatomie tribe and of Indian blood, with the permission of the President, and under such regulations as the Secretary of the Interior shall provide, except as may be hereinafter provided."

Article 3 of this same Treaty provided that at any time thereafter when the President of the United States should become satisfied that any allottee had become sufficiently intelligent to control his or her affairs, he might, at the request of the allottee, cause the land held by him or her to be patented in fee simple with power of alienation. This section also provided that:

"Thereafter the lands so patented to them shall be subject to levy, taxation, and sale, in like manner with the property of other citizens."

Thereafter, in 1887, Congress passed a general allotment act. (24 Stat. 38, 25 U.S.C.A. Sec. 348.) Section 5 of that act has been referred to hereinbefore as the section particularly pertinent to the present litigation, and is set out as Appendix B hereto. That section provides that upon the approval of the allotments the Secretary of the Interior should cause patents to issue therefor in the name of the allottees, which patents should declare that the United States would hold the land thus allotted for a period of 25 years for the sole use and benefit of the Indian allottee; that at the end of said period a patent should be given to the Indian in fee. It was provided that the President might in any case extend the trust period.

As we have particularly mentioned hereinbefore Congress thereafter, in February, 1927, passed an act which was amended on February, 1931, authorizing the Secretary of the Interior to cancel fee simple patents issued to Indian allottees under certain circumstances. (46 Stat. 1205, 25 U.S.C.A. Sec. 352a). This provision is set out as Appendix D hereto.

SPECIFICATION OF ERRORS

The Circuit Court of Appeals below erred:

1. In holding that the United States of America on behalf of M-Ko-Quah-Wah could recover interest on taxes which she paid to Jackson County, Kansas, during the time she held a fee patent from the Government to the land which was the subject of the taxation, and such holding is contrary to the decisions of the Ninth Circuit Court of Appeals in cases practically identical in facts and circumstances.

2. In holding that the United States Government had the right to recover interest for an Indian allottee on taxes collected on Kansas land, which decision involves an important question of local law contrary to and in conflict with decisions of the Supreme Court of the State of Kansas.

SUMMARY OF LAW POINTS

I.

A County is a Political Subdivision of the State, Created for Strictly Governmental Purposes.

United States v. Nez Perce County, Idaho, 95 F. 2d 238.
Jackson County v. Kaul, 77 Kan. 715-717, 96 P. 45.
Seton v. Hoyt, 34 Or. 266, 55 P. 967, 43 L.R.A. 634, 75 Am. St. Rep. 641.

II.

A County as a Governmental Agency is Not Liable for Interest in the Absence of a Positive Statute So Requiring or an Express Agreement to Pay.

United States v. North Carolina, 136 U.S. 211, 10 S. Ct. 920, 34 L. Ed. 336.
United States v. North American Transp. & Trading Co., 253 U.S. 330-336, 40 S. Ct. 518, 64 L. Ed. 935.
Seaboard Air Line R. Co. v. United States, 261 U.S. 299-304, 43 S. Ct. 354-355, 67 L. Ed. 664.
Glacier County, Montana, v. U. S., 99 F. 2d 733.
United States v. Lewis County, Idaho, 95 F. 2d 236.
United States v. Nez Perce County, Idaho, 95 F. 2d. 238.
United States v. Nez Perce County, Idaho, 95 F. 2d. 232.
Jackson County v. Kaul, 77 Kan. 715-717, 96 P. 45.
Salt House v. McPherson Co., 115 Kan. 668, 224 P. 70.
School Dist. v. County Commissioners, 127 Kan., 292, 273 P. 427.
Kittridge v. Boyde, 137 Kan. 241-243, 20 P. 2d. 811.
15 R.C.L. 17.

III.

In the Absence of a Strict Legal Right as by Force of Statute or Contract the Government May Not Under the Facts of This Case Demand Interest Payments on Collected Taxes from the County on Behalf of an Indian Allottee as Damages.

United States v. Nez Perce County, Idaho, 95 F. 2d. 238.
Glacier County Montana v. U. S., 99 F. 2d. 733.
U. S. v. Board of Co. Commissioners, Commanche County, Oklahoma, 6 F. Supp. 401.
U. S. v. Board of Co. Commissioners, Pawnee County, Oklahoma, 13 F. Supp. 641.

ARGUMENT

The Sole Question Presented to This Court for Its Decision is Whether Interest Can be Collected on Taxes Collected by a Kansas County from an Indian Allottee, the Attempt to Collect the Refund Being Made at a Time Long After the Taxes Had Been Paid and While the Allottee Held a Fee Patent from the Government to the Land: This in the Absence of Any State Statute or Contract of Any Kind Authorizing or Requiring the Payment of Such Interest.

The facts as set out in the statement of the case hereinbefore made should be kept in mind. While it is true that the fee patent issued by President Wilson to the allottee in question on April 17, 1918, was issued without the consent of the allottee as provided in the treaty (Appendix A), nevertheless it was issued after a full and complete investigation by a Competency Commission. The report of this Commission was sent to the office of the Secretary of the Interior, where the report of the Commission was approved, and request was sent to the General Land office that a fee patent be issued to the allottee, which was done. That patent which was described as "special" in character stood unchallenged until the Act of February 26, 1927, when, under the provisions of the Act passed on that date (44 Stat. 1247), and as amended in 1931 (46 Stat. 1205) (see Appendix D hereto), and, for some time additional, until May 20, 1935, for the first time the Secretary of Interior took steps to cancel the patent of April 17, 1918. As appears from the statement of facts, the county collected taxes only for the years 1919 to 1933, inclusive. So that during the time of this patent, which so far as the county is concerned, was not at law challengeable, the county had every apparent right to collect taxes from the Indian. If there was any mistake of any kind in issuing the patent, or if there was any laches in attempting to secure a refund of the taxes, it was on the part of the Government, and the

government officials. The county officials were fully warranted in thinking that the land was subject to taxation from the time the patent was issued in 1918 up until the time the Government, acting under the long subsequent Act of Congress, cancelled it. The sole basis upon which the authorities hold that such taxes must be refunded to the Indian allottee is that they were collected during the time of the existence of a patent to the allottee which had been issued without his or her request. Is it not fair to inquire how the county should know whether or not the allottee had made a request for the issuance of the fee patent? Was not the county warranted in assuming when the government of the United States issued a patent to an humble Indian allottee, who under the provisions of the statute was a ward of the government, that the government had taken every statutory precaution to protect the rights of the Indian? Can it reasonably be said that it was the duty of the county in each case of the many Indian allottees within its boundaries to make an inspection of the records at Washington to ascertain if every detailed step of the necessary procedure for the protection of the rights of the Indian in connection with the issuance of a fee patent had been taken? The query indicates the answer; which is, that the county was fully warranted in assuming that the government, the trustee of the rights of the Indian allottee, had taken all essential steps prior to the time of the issuance of the patent. For the government to now come back on the county long years after the taxes had been collected, and speaking on behalf of the allottee, attempt to collect interest on payments of taxes which had been assessed in good faith by the county in reliance upon a fee simple patent issued by the government to the allottee, is to place an illegal as well as an unwarranted and unwarrantable burden on the county.

Article 3 of the Treaty between the Government of the United States and the Indians provided in part:

"Thereafter the land so patented to them shall be subject to levy, taxation and sale, in like manner with the property of other citizens."

It is reasonable to contend that the county taxing officials being advised that a patent had been issued by the government, were fully warranted in assuming that the patent had been properly issued, and in making collection of taxes until they were advised to the contrary. In such circumstances, under the law, interest is not a valid item to be recovered.

With this brief statement of the facts made for the purpose of showing clearly that all error and laches in connection with the collection and refund of the taxes was upon the government, we turn to a discussion of the law questions involved.

There is no statute in the State of Kansas which authorizes the collection of interest from a county. The Kansas Supreme Court holds that a county is a political subdivision of the State.

The Supreme Court of the State of Kansas in the case of *Jackson County v. Kaul*, 77 Kan. 717, 96 P. 45, held as follows, as shown by the syllabus of the case, as prepared by the Court:

"The general interest statute allowing creditors to receive in the absence of contract, interest upon money after it becomes due cannot be interpreted to impose a liability upon a county, which is a political subdivision of the state, organized for purely governmental purposes and endowed with *quasi*-corporate powers only; and, in an action against county officers to recover taxes wrongfully exacted over the protest of the taxpayer and through the compulsion of a tax warrant, interest on the money from the time it was paid (it then being due) cannot be recovered."

In the opinion, referring to the general statute of the State of Kansas which permits creditors to receive interest

at the rate of six per cent per annum when no other rate of interest is agreed upon, for any money after it becomes due (Sec. 41-101, G. S. Kans. 1935), the court said:

"The word 'creditors' is here used in the broad sense of those who have the legal right to demand and receive the payment of money, and includes the plaintiff, in the transaction under investigation. The money having been wrongfully extorted from the plaintiff by the threatened seizure of his property under the tax warrant then in the sheriff's hands for execution, the county had no right to retain it for a single day. It owed the plaintiff the duty to make restitution at once. (See 22 Cyc. 1506.) No demand was necessary, because the money had been exacted over the plaintiff's protest and denial of liability. Therefore the money was 'due' as soon as the county had taken it.

"So far the statute has been looked at from the creditor's side. Considered from the viewpoint of the debtor, it imposes a duty and a liability outside of contract which would not otherwise exist. Do its merely general terms extend to counties? The general rule that the state is not bound by statutes limiting rights and imposing burdens unless it be expressly named or be intended by necessary implication is familiar. (*The State v. Book Co.*, 69 Kan. 1, 24, 76 Pac. 411, and authorities there cited.) To bind the state by an implication it must be one that is unavoidable. If there be a doubt upon the subject, that doubt must be resolved in favor of the state. (*The State v. School District*, 34 Kan. 237, 242, 8 Pac. 208.)

"Counties are mere political subdivisions of the state. (*Commissioners of Shawnee County v. Carter*, 2 Kan. 115.) They are mere instrumentalities of the state in the exercise of its governmental functions, and are given corporate power only so far as may be necessary to aid those functions. They are only *quasi*-corporations (*Comm'rs of Neosho Co. v. Stoddart*, 13 Kan. 207, 210; *Freeland v. Stillman*, 49 Kan. 197, 207, 30 Pac. 235; *In re Dalton*, 61 Kan. 257, 264, 59 Pac. 336, 47 L.R.A. 380; *The State v. Wilson*, 65 Kan. 237, 238, 69 Pac. 172), and

are clearly distinguished from municipal organizations like cities, which are given far greater powers and are endowed with much larger measures of corporate life. (1 Dill. Mun. Corp., 4th ed., No. 25; 11 Cyc. 341 *et seq.*) This suit can be maintained only because it relates to a subject which falls strictly within the limits of expressly granted authority. If it does not, the county cannot be sued any more than the state itself. When the statutes have made no distinction a county is entitled to the same privileges and immunities as the state."

As indicated, the collection of interest from the county was denied. As stated above, there is no other statute in Kansas which evidences the consent of that state to a recovery of interest upon tax money which has been collected erroneously.

In the case of *Salthouse v. McPherson County*, 115 Kans. 668, 224 Pac. 70, it is held:

"A judgment against a county in an action for the repayment of a void tax does not bear interest, the statute providing in general terms that judgments shall bear interest not applying where the state or county is the debtor."

In the opinion, 15 R.C.L., page 17, is cited. This text reads as follows:

"It is well settled, both on principle and authority, that a state cannot be held to the payment of interest on its debts unless bound by an act of the legislature or by a lawful contract of its executive officers made within the scope of their duly constituted authority. This principle applies to bonds, claims, judgments, and warrants. The theory upon which the rule is based is that whenever interest is allowed either by statute or by common law, except in cases where there has been a contract to pay interest, it is allowed for delay or default of the debtor. But delay or default cannot be attributed to the government. It is presumed to be always ready to pay what it owes. The apparently fav-

ored position of the government in this respect has been declared to be demanded by public policy. A county is generally regarded as but an arm or agent of the state, and not liable for interest, in the absence of an express agreement to pay it."

This rule is also followed in the case of *School District v. County Commissioners*, 127 Kan. 292, 273 Pac. 427, where it was held:

"Interest may not be recovered from a county except through express provision of statute."

This, then, is the rule in Kansas concerning the collection of interest from counties, which, as is demonstrated by the case of *Jackson County v. Kaul, supra*, are regarded as instrumentalities of the state. The ruling of the highest court in Kansas is to the effect that there is no applicable statute in Kansas which authorizes the collection of interest on judgments for the refund of tax money erroneously collected.

A similar situation as to law exists in the State of Idaho. In that state there is a statute which allows interest on taxes refunded after erroneous collection, but there is no statute of that state which evidences the consent of the state to a recovery of interest in a case such as is presented here. Under such a state of facts and circumstances, the United States Circuit Court of Appeals for the Ninth Circuit held that interest could not be recovered by the United States on behalf of an Indian ward living in Idaho. The facts there were practically identical to the facts in the present case. See *United States v. Nez Perce County, Idaho*, 95 F. 2d. 232. On page 236 of the opinion in that case the following appears:

"The recovery of interest on the amounts paid as taxes should not be allowed. *Interest may not be recovered upon money due from the sovereign unless some positive statute or contract of the state evidences its consent to pay it. United States v. North Carolina*, 136 U.S. 211, 10 S. Ct. 920, 34 L. Ed. 336; *United States v. North*

American Transp. & Trading Co., 253 U.S. 330, 336, 40 S. Ct. 518, 64 L. Ed. 935; *Seaboard Air Line R. Co. v. United States*, 261 U.S. 299, 304, 43 S. Ct. 354, 355, 67 L. Ed. 664. The county is a political subdivision of the state, and as such would seem to be entitled to this form of immunity. While the Code provision (section 61-1902, Idaho Code 1932) allows interest on taxes refunded after erroneous collection, the statute has no application in suits for refund brought in the federal courts. We are not aware of any statute of the State of Idaho which evidences the consent of that state to a recovery of interest in a situation such as the one presented here." (Italics ours.)

A rehearing was granted in that case on the sole contention that the court committed error in denying to the Government the recovery of interest. The opinion denying a rehearing is reported in 95 F. 2d 238, beginning on page 239 the court uses the following language:

"Unless the government is here entitled to interest as a strict matter of legal right, as by force of statute or contract, it is in no position to demand interest as damages. Its situation in that respect is conspicuously lacking in equity. The amended bills in these cases were filed in September, 1935. This was nine or ten years after the last payment of taxes had been made by the Indians, and the payments themselves had extended over a prior period of four or five years. Thus interest is sought on payments made as long as fourteen years before the commencement of the suits, and in no instance has the delay in seeking recovery been less than nine years. These delays are in no manner traceable to fault on the part of the counties or their governing officials, but are due to inexcusable laches on the part of the government itself. Again, the counties were in no way responsible for the issuance of the fee patents to the Indians in the first place. This was an act of the government itself, occasioned by facts and circumstances peculiarly within the knowledge of those representing it. The local authorities had a right to rely upon the

conduct of the government in the issuance of the patents, and were by this conduct induced to believe that the lands were subject to tax. The good faith of the counties and of their officers and governing boards is not open to question. For many years their budgets were formulated and their levies were fixed on the assumption—certainly not an unreasonable one—that these patented lands were part of the whole body of property subject to tax. Were the rights of the United States alone to be considered in these cases, its conduct might properly be held to estop it from any recovery at all. Nor, as indicated in the original opinions, is there a showing in either case that the Indian paid the taxes under protest. We have held that the United States is not precluded on this account from recovering the principal of the tax; but it does not follow that the Indians, having paid the taxes without protest, are themselves equitably entitled to interest by way of damages because of the retention of the moneys so paid. Nor is there any showing that the counties have earned or received interest on the moneys illegally exacted.

"Under all the circumstances, it is clear that the government is entitled to no more than a refund of the principal of these payments. The allowance of interest, even if normally recoverable, would be an abuse of discretion."

In the present case, the petition of the Government was filed on December 23, 1936, fifteen years after the first payment of taxes was made, and more than two years after the last item of taxes had been paid. Thus interest is sought on payments made as long as fifteen years before the commencement of the suit. As in the opinion last above quoted from, the delay in attempting to collect the taxes is in no manner traceable to fault on the part of the county or its officers, but is due alone to the laches on the part of the Government. Also, as in the foregoing case, the county here was in no way responsible for the issuance of the fee patent to the Indian allottee. That was an act of the Government.

the plaintiff in the case, occasioned and prompted by facts and circumstances which were peculiarly within the knowledge of the Government officials.

We submit the logic of the court in the above case, where it holds that under such a situation the local authorities had a right to rely upon the conduct of the Government in the issuance of the patent and that they are warranted in believing the lands were properly taxable, is sound. There was no evidence in this case which in any way questioned the good faith of the county officers, and there is nothing to show that they were arbitrary or unreasonable in making the tax levies against the property of the Indian in question. As in the foregoing case, they undoubtedly made their budgets and the levies were fixed upon the very reasonable assumption that these lands having been patented in fee by the Government were subject to taxation. There is no showing in the case that the county has ever received interest on the tax moneys collected from the allottee in question. In fact, the evidence is directly to the contrary, in that it shows the county officials largely disbursed the money to state, townships and school districts, the county having been the collecting agency for those branches of the state government. In such a situation, under the authority of the case last cited, interest may not be collected in the nature of damages, even in an action by the government. (*Redfield v. Bartels*, 139 U. S. 694-701, 11 S. Ct. 683-686, 35 L. Ed. 310. *Sanborn v. U. S.*, 135 U. S. 271, 281, 10 S. Ct. 812, 34 L. Ed. 112.)

There are many Indians in Jackson County, Kansas, for whom the Government has not yet filed suit. If the interest rule as announced and found by the Circuit Court of Appeals for the Tenth Circuit is permitted to stand, many other large items of interest of this character will be charged to, and collected from Jackson County, Kansas. The county is rural in its characteristics. The farmers and few business men residing therein are in very low financial condition. If these citizens are required to pay interest on these ancient

tax levies, which were occasioned by errors on the part of the Government in the issuance of fee patents to Indians, an extraordinary and unreasonable additional financial burden will be cast upon the Kansas citizens to the unreasonable advantage of Indian allottees. So far as the record in this case is concerned, the Indian here involved was, and is, financially well fixed. She was found by the Competency Commission sent out by the Government to be fully competent to handle her own affairs.

The Circuit Court of Appeals for the Tenth Circuit in the present case in its opinion (Tr. 49-62) cites authorities which are not appropriate to the conclusion ultimately reached by the court on the question of interest. Condemnation cases, and cases where food, fuel and supplies were requisitioned by the government are cited. But the authorities make a distinction between cases where property has been taken and compensation is claimed under the Fifth Amendment to the United States Constitution, and cases in which refunds of tax moneys are sought. See *Flemming v. County Commissioners*, 119 Kan. 598, 602, 240 Pac. 591; *Seaboard Air Line R. Co. v. U. S.*, 261 U.S. 299, 304, 43 S. Ct. 354, 355, 67 L. Ed. 664.

In the opinion in the present case the Circuit Court of Appeals cites Section 34 of the Federal Judiciary Act of 1789, 28 U.S.C.A., Sec. 851, which provides that the laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, the inference from such citation being that the rights in question in the present action are governed by provisions of the Federal Constitution, treaties or statutes. However, there are no constitutional provisions or statutes, or provisions of the treaty involved in the present case (Articles 2 and 3 of Treaty of November 15, 1861 [12 Stat. 1191. See Appendix A]) which require the payment of interest by states or subdivisions of

states where taxes are erroneously collected. We are conceding the correctness of the opinion of the District Court in granting a refund of the principal amount of taxes paid. That is as much as the treaty involved in this case contemplates. It simply says that the land shall be free from taxation. If the taxes are refunded, it will be free from taxation. There is nothing in the treaty which says that interest may also be charged. The Circuit Court of Appeals in the opinion in the present case attempts to distinguish the case of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 787, by referring particularly to the exception as announced in the Federal Judiciary Act referred to above. The quotation in the opinion from the Erie case in that respect is as follows:

> "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. * * * There is no federal general common law."

Apparently the Circuit Court of Appeals takes the view that the exception just quoted fits the present situation, but there are no federal constitutional provisions or federal statutes which authorize the collection of interest in cases of this character. From this it is apparent that the conclusion of the Tenth Circuit Court of Appeals in support of its decision as to the interest item is not sustained by the clear logic and reasoning that was adduced by the Ninth Circuit Court of appeals in the Idaho and Montana cases above referred to.

As a matter of fact, the judgment of the Circuit Court of Appeals for the Tenth Circuit in this case does not even agree with two prior judgments in almost identical cases as decided by District Judges within the same Circuit. In the case of *United States v. Board of Commissioners of Comanche County, Oklahoma*, 6 F. Supp. 401, District Judge Vaught decided in a case almost identical in its facts with the case now before the court that interest could not be recovered on

the taxes sued for. The taxes in that case were paid under protest. The court in that opinion, on page 403, states:

> "Where taxes are paid under protest, the collecting authority can only hold them in trust, and since Comanche County would be regarded in this case as a trustee, this court knows of no provision for the payment of interest except by taking the interest from some other fund whose application had been provided by statute."

Judgment was thereupon entered for the amount of the taxes without interest.

Later, the District Court of Oklahoma in the case of *United States v. Board of County Commissioners of Pawnee County, Oklahoma*, 13 F. Supp. 641, in an opinion written by Judge Kennamer, reached a conclusion in another case exactly in line with the case now before this court, that interest could not be collected. The taxes in that case were not paid under formal protest, but the court held that the judgment for the Indian plaintiff should not carry interest.

These decisions are in line with the case of *Kittredge v. Boyd*, 137 Kan. 241, 20 P. 2d. 811. Beginning on page 243 of the opinion, it is said:

> "That is the question whether interest should be paid on the protested sums during the time the state treasurer has held them pending an authoritative adjudication on the legality of the statute. In our opinion the state treasurer served as official stakeholder for all parties concerned. He has no fund to pay interest. While we have held that plaintiffs had no adequate remedy at law, and in consequence they could rightfully bring mandamus in these cases, mandamus was not the only extraordinary procedural redress—an injunction or mandatory injunctive proceeding in the district court, and could thereby have procured an adjudication on the state's claim to these illegal tax exactions without having paid over the money at all. The procedure they did follow was simpler and more expeditious, but it does not entitle them to interest on their funds while they have been in the hands of the state treasurer."

Thus it is that as against cases of exact similarity the decision here of the Circuit Court of Appeals for the Tenth Circuit stands out alone, and unsupported by other federal authorities. The court was clearly in error in holding that interest charges could be properly collected on the taxes paid by the Indian allottee.

Another very late case by the Ninth Circuit Court of Appeals where the facts are practically identical with the facts in the present case is that of *Glacier County, Montana, v. United States*, 99 F. 2d 733. That was an action by the Government on behalf of an Indian ward to recover taxes which had been assessed and collected during the time when the trust period as provided by the General Allotment Act of 1887 was still running. The court adhered to its earlier decisions cited hereinbefore in holding that while the taxes should be refunded to the Indian, interest could not be collected from the County. This decision was handed down on October 15, 1938, indicating the clear intent of the United States Circuit Court of Appeals for the Ninth Circuit to adhere to its earlier decisions, and to regard the holding of no interest liability as established law.

We submit:

First: The Circuit Court of Appeals for the Tenth Circuit has rendered a decision in the present case directly in conflict and irreconcilable to the decisions of the Circuit Court of Appeals for the Ninth Circuit in the cases of *United States v. Nez Perce County, Idaho*, and *United States v. Lewis County, Idaho, supra*, where the identical question as to the right of recovery of interest was involved. The opinion of the Tenth Circuit Court of Appeals requires the county to pay interest on tax moneys, some of which was collected as much as fifteen years prior to the date of the bringing of the suit. The total interest charges amount to almost as much as the principal amount of the taxes paid.

The opinion of the Ninth Circuit Court of Appeals holds that outside and beyond the fact that interest may not be collected as a matter of law, to require such a payment would work a grave inequity against the county and that interest may not therefore be collected as damages. Thus there is a direct conflict; and it is apparent that the Circuit Court of Appeals for the Ninth Circuit reached the correct result.

Second: The decision of the Circuit Court of Appeals for the Tenth Circuit in the present case requiring the payment of interest is a decision on an important question of local law, which is contrary to and in conflict with the laws of the State of Kansas in which the land in question is situated, and where the case was filed and tried in the Federal District Court. The rule announced in the case of *Erie R. Co. v. Tompkins, supia,* requires that the law of the state must be applied where the Federal Constitution, Federal statutes or Federal Treaties do not provide to the contrary. We submit the rule announced by the state court as shown heretofore is not contradictory to any provisions of the Federal Constitution, Federal Statutes or of any Federal Treaty involved in this case and that it should control.

CONCLUSION

We submit that we have demonstrated the correctness of the conclusions of law, as contained in the opinions of the Ninth Circuit Court of Appeals, that it is illegal and unlawful to now attempt to require the petitioner here to pay interest on taxes collected many years ago in full good faith. Over and above this, the case presents a serious situation to the petitioner, a rural municipality, whose indebtedness to other Indians will be nearly doubled if the erroneous ruling announced by the Tenth Circuit Court of Appeals is adhered to. To require the payment of interest would work a grave inequity inasmuch as the county was misled by acts on the part of the government in issuing a fee patent which stood

unchallenged and uncancelled until after the last portion of the taxes in question had been collected.

The Indian allottee in this case, as found by the Competency Commission, was capable, both financially and intellectually, to attend to her own affairs. Although she was receiving all the benefits of county and state government, she avoided the payment of any taxes by the simple expedient of refusing to request the issuance by the government of a fee patent to her. Her testimony indicates that she was clearly fearful that if she made such a request her property would be subjected to taxes, although she was fully able to pay all the taxes assessed. This demonstrates how very unfair it is that she should recover more than the amount of the taxes which were reasonably assessed against her, in view of the acts of the government officials.

It is, therefore, respectfully submitted that the decisions of the Tenth Circuit Court of Appeals in this case should be reversed as to the collection of the interest on the tax money only, and that the views and conclusions of the Ninth Circuit Court of Appeals, as shown by cited cases, should be upheld.

Respectfully submitted,

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JACKSON, IN THE STATE OF KANSAS, A BODY POLITIC AND QUASI PUBLIC CORPORATION,
Petitioner,
By THOMAS M. LILLARD,
Counsel for Petitioner.

O. B. EIDSON,
DEAN SHRADER,
FLOYD W. HOBBS,
Of Counsel.

APPENDIX

A

Articles 2 and 3 of the Treaty of November 15, 1861 (12 Stat. 1191):

ARTICLE 2. It shall be the duty of the agent of the United States for said tribe to take an accurate census of all the members of the tribe, and to classify them in separate lists, showing the names, ages, and numbers of those desiring lands in severalty, and of those desiring lands in common, designating chiefs and head-men, respectively; each adult choosing for himself or herself, and each head of a family for the minor children of such family, and the agent for orphans and persons of an unsound mind. And thereupon there shall be assigned, under the direction of the Commissioner of Indian Affairs, to each chief at the signing of the treaty, one section; to each head-man, one-half section; to each other head of a family, one-quarter section; and to each other person eighty acres of land, to include, in every case, as far as practicable, to each family, their improvements and a reasonable portion of timber, to be selected according to the legal subdivision of survey. When such assignments shall have been completed, certificates shall be issued by the Commissioner of Indian Affairs for the tracts assigned in severalty, specifying the names of the individuals to whom they have been assigned, respectively, and that said tracts are set apart for the perpetual and exclusive use and benefit of such assignees and their heirs. Until otherwise provided by law, such tracts shall be exempt from levy, taxation, or sale, and shall be alienable in fee or leased or otherwise disposed of only to the United States, or to persons then being members of the Pottawatomie tribe and of Indian blood, with the permission of the President, and under such regulations as the Secretary of the Interior shall provide, except as may be hereinafter provided. And on receipt of such certificates, the person to whom they are issued shall be deemed to have relinquished all right to any portion of the lands assigned to others in severalty, or

to a portion of the tribe in common, and to the proceeds of sale of the same whensoever made.

ARTICLE 3. At any time hereafter when the President of the United States shall have become satisfied that any adults, being males and heads of families, who may be allottees under the provisions of the foregoing article, are sufficiently intelligent and prudent to control their affairs and interests, he may, at the request of such persons, cause the lands severally held by them to be conveyed to them by patent in fee-simple, with power of alienation; and may, at the same time, cause to be paid to them, in cash or in the bonds of the United States, their proportion of the cash value of the credits of the tribe, principal and interest, then held in trust by the United States, and also, as the same may be received, their proportion of the proceeds of the sale of lands under the provisions of this treaty. And on such patents being issued and such payments ordered to be made by the President, such competent persons shall cease to be members of said tribe, and shall become citizens of the United States; and thereafter the lands so patented to them shall be subject to levy, taxation, and sale, in like manner with the property of other citizens: *Provided*, That, before making any such application to the President, they shall appear in open court in the district court of the United States for the district of Kansas, and make the same proof and take the same oath of allegiance as is provided by law for the naturalization of aliens, and shall also make proof to the satisfaction of said court that they are sufficiently intelligent and prudent to control their affairs and interests, that they have adopted the habits of civilized life, and have been able to support, for at least five years, themselves and families.

B

Section 5 of the General Allotment Act of February 8, 1887, c. 119 (24 Stat. 38; 25 U. S. C., Sec. 348):

Upon the approval of the allotments provided for in sections 331 to 334, inclusive, and 336 by the Secretary of

the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of this decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. * * *

C

Act of May 8, 1906, c. 2348 (34 Stat. 182, 25 U. S. C., Sec. 349):

> At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; * * * and thereafter all restrictions as to sale, encumbrance, or taxation of said land shall be removed * * *.

D

Act of February 26, 1927, c. 215 (44 Stat. 1247) as amended by the Act of February 21, 1931, c. 271 (46 Stat. 1205, 25 U. S. C., Sec. 352):

> The Secretary of the Interior is hereby authorized, in his discretion, to cancel any patent in fee simple issued to an Indian allottee or to his heirs before the end of the period of trust described in the original or trust patent issued to such allottee, or before the expiration of any extension of such period of trust by the President, where such patent in fee simple was issued without the consent or an application therefor by the allottee

or by his heirs: *Provided,* That the patentee has not mortgaged or sold any part of the land described in such patent: *Provided also,* That upon cancellation of such patent in fee simple the land shall have the same status as though such fee patent has never been issued.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 14

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JACKSON, ETC.,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

THOMAS M. LILLARD,
Counsel for Petitioner.

O. B. EIDSON,
DEAN SHRADER,
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There being no statute providing for the recovery of interest, the decisions of the Kansas Court that interest is not recoverable against the county should be followed.

The brief filed by the United States assumes that the treaty with the Pottawatomie Indians, and the Acts of Congress relating to the allotted lands are to be construed as though they contain by implication a provision somewhat as follows:

> "In the event that a state or a subdivision of a state shall collect taxes on the allotted lands during the trust

> period, the state or subdivision of a state making such collection shall be liable to the United States as guardian of such Indian Allottee for the amount so collected, together with interest thereon at the rate of six per cent per annum from the date of collection."

Neither the treaty nor the statutes in fact contain such a provision. Nor can we find any indication that Congress intended to do more than declare the exemption. In these enactments Congress appears to have purposely left the remedy open to be governed by State law, or, at least, to be determined by the courts as a procedural question. The treaty and the Acts of Congress are drafted upon the assumption that States and subdivisions of States will observe the exemption and will not levy and collect taxes on the allotted lands during the trust period. In framing the treaty and the statutes the Federal authorities did not attempt to deal with the form or the extent of the remedy in the event a State or a subdivision of a State should collect taxes in disregard of the exemption.

There being, then, no statutory provision for the recovery of interest, the question is whether the principles applied in the State courts or the principles applied in the Federal courts are to govern in determining the right to recover interest?

We have shown in our original brief that under the Kansas decisions, in the absence of any specific statute, interest is not collectible in suits against the county for the recovery of taxes unlawfully collected (Brief, pp. 13-16). There appears to be a general conflict between State court decisions and Federal court decisions on the question of recovery of interest in the absence of a statute expressly authorizing it. Thus, in *Billings* v. *United States*, 232 U. S. 261, the court says on page 287:

> "The conflict between the systems is pronounced and fundamental. In the one, the state rule, except as to

> contract, no interest without statute; in the United States rule, interest in all cases where equitably due unless forbidden by statute."

The respondent's brief cites the cases of *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 386 n., and *Procter & Gamble Distributing Co.* v. *Sherman*, 2 F. (2d) 165 (S. D. N. Y.), as holding the remedy at law to be inadequate and granting equitable relief in cases where the State has not provided for interest on taxes legally refundable. These cases demonstrate that if the suit is at law, in the absence of a State statute specifically allowing interest, interest cannot be recovered. The present suit is at law, and not a suit in equity. Hence, the remedy obtainable in this case will not include the recovery of interest under the authorities just cited.

The decisions in these cases that the absence of a right to recover in a suit at law, interest on taxes wrongfully collected makes the remedy at law inadequate do not intimate that the State laws are for that reason unconstitutional. But they do demonstrate that when, as here, a suit at law is brought to recover taxes, the State can discharge its full liability by payment of the principal without interest.

The rule announced by this Court in *Erie R. Co.* v. *Tompkins*, 304 U. S. 65, that:

> "In federal courts, except in matters governed by Federal Constitution or by Act of Congress, law to be applied in any case is the law of the state",

while perhaps not decisive of the point involved in the present case, shows quite definitely the Federal court trend towards following the State court decisions on questions which might be described as judge-made law as distinguished from statutory law. And the question here involved is of that nature.

Hence, the court should here adopt and follow the rule so frequently applied by the Kansas court that a county, in the absence of a definite statute so providing, is not liable for interest on taxes wrongfully collected.

Even under the Federal Court rule as to liability for interest, there is no liability in the present case.

In *Billings* v. *United States*, 232 U. S. 261, 286, the Federal Court rule with reference to the recovery of interest where there is no statute requiring its payment is thus stated:

> "that a statute was not necessary to compel its payment where in accordance with the principles of equity and justice in the enforcements of an obligation, interest should be allowed."

Applying the test here laid down, the inquiry is, do "*the principles of equity and justice*" require that interest should be paid? The contention throughout the Government's brief is that interest should be allowed in order that the incompetent Indian may be fully compensated.

Clearly, however, in determining whether or not equitable principles require the payment of interest in any given case the question must be examined not merely from the standpoint of the claimant, but also from the standpoint of the party who will have to pay. It is not alone sufficient in the present case to conclude that the incompetent Indian may not be fully compensated until he receives interest, as well as principal, on the amount of taxes he paid. It is necessary also to inquire whether the county may in fairness and equity be required to make the payment. It is to be remembered that the President actually issued a full fee title patent to this Indian before any taxes on the allotted lands were levied and collected by the county. The patent had all the earmarks of validity, and there was no known fact or circumstance that might have put the county upon suspicion

that any infirmity existed in the patent. The county was clearly warranted in assuming that after the issuance of such patent, the land was subject to taxation. We call attention to the provision in the latter portion of Article 3 of the Treaty (petitioner's brief, p. 27) which refers to the rights of the allottee after the issuance of a fee patent by the Government. It is there provided that:

> "thereafter the lands so patented to them shall be subject to levy, taxation, and sale, in like manner with the property of other citizens."

The patent in question was issued to the allottee and was delivered to her. It is a well-known principle of law that public officers are presumed to do their duty, and there is a further presumption that all necessary preliminary steps to the issuance of a patent have been taken.

Wright-Blodgett Co. v. *U. S.*, 236 U. S. 397;
Bouldin v. *Massie*, 7 Wheat. 122, 5 L. Ed. 414;
U. S. v. *Peterson*, 34 F. (2d) 245;
U. S. v. *Porter Fuel Co.*, 247 Fed. 769, 159 C. C. A. 627.

It was therefore proper for any one to assume that the patent had been regularly issued.

U. S. v. *Beaman*, 242 Fed. 876, 155 C. C. A. 464;
Harkrader v. *Carroll*, 76 Fed. 474.

At this point we wish to call attention particularly to section 6 of the General Allotment Act of February 8, 1887, as amended by the Act of May 8, 1906 (34 Stat. 182, 25 U. S. C. A., Sec. 349) which we set out partially as Appendix C of our original brief before this Court. We find we did not include enough of this section in that quotation. In addition to the provisions there set out, the act provided as follows:

> "Provided, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he

> shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent:"

In the case of *Miller* v. *United States*, 57 F. (2d) 987, upon application of certain Indian allottees who held trust patents to land under the General Allotment Act of 1887, the Secretary of the Interior sent out a competency commission (just as was done in the present case) to investigate their intelligence. Upon a finding of the commission that the Indians were competent, the Secretary found they were capable of managing their own affairs and upon his recommendation fee patents were issued. The court referred to section 6 (quoted above) of the General Allotment Act as amended and held as follows:

> "The master was confronted with the rulings of the Secretary, and we think the Secretary's findings that the Indians were competent cannot be ignored, but must be accepted for all purposes of these appeals; unless the rulings can be avoided on some settled principle of equity. United States *v.* Budd, 144 U. S. 154, 12 S. Ct. 575, 36 L. Ed. 800; United States *v.* Stinson, 197 U. S. 200, 25 S. Ct. 426, 49 L. Ed. 724; Lykins *v.* McGrath, 184 U. S. 169, 22 S. Ct. 450, 46 L. Ed. 485; Durango Land & Coal Co. *v.* Evans (C. C. A.), 80 Fed. 425; United States *v.* Northern Pac. R. R. Co. (C. C. A.), 95 Fed. 864."

In the case of *Larkin* v. *Paugh*, 276 U. S. 431, an allottee holding a trust patent requested that a fee patent be issued prior to the expiration of the twenty-five year trust period provided by the General Allotment Act of 1887. The Secretary of the Interior approved the application but the

Indian died just prior to its issuance. In passing upon the question as to whether under these circumstances the patent would pass the title this Court said:

> "With the issue of the patent, the title not only passed from the United States but the prior trust and the incidental restriction against alienation were terminated. This put an end to the authority theretofore possessed by the Secretary of the Interior by reason of the trust and restriction—so that thereafter all questions pertaining to the title were subject to examination and determination by the courts, appropriately those of Nebraska, the land being there. Brown *v.* Hitchcock, 173 U. S. 473; Lane *v.* Mickadiet, 241 U. S. 201, 207 *et seq.*"

This at the time of the issuance of the fee patent, in the present case, there was a Federal statute and rulings of this Court which apparently authorized its issuance upon the findings of a competency commission that the Indian was capable of managing her own affairs. Such a finding was made and in view of the statute, the finding of the commission and of the issuance of the patent the county was fully warranted in assuming the Indian had been emancipated by the Government. She was living just as fully, intelligently and efficiently as any white citizen of that vicinity; she was receiving all of the benefits of local government and accordingly the year following the issuance of the fee patent the county placed the land upon the tax roll. This action was obviously occasioned by the attitude of the Federal Government. If the county had investigated the proceedings leading up to the issuance of the fee patent they would have discovered all of the facts as shown in the record, which indicate that the Indian allottee in question was fully competent to handle her own affairs. It is interesting to note that from the wording of the Act of February 26, 1927 (Appendix D of our original brief) Congress and the Federal Government

deemed it essential to pass a particular act authorized the cancellation of patents like the one issued to the allottee in the present case. That act provided that the Secretary of the Interior was authorized "in his discretion" to cancel such patents. The implication being that until they were cancelled, they were in full force and effect. The act also provided, "that upon cancellation of such patent in fee simple the land shall have the same status as though such fee patent had never been issued." Thus it is apparent Congress considered that while the fee patent stood uncancelled the land was subject to taxation just as was provided in the original treaty. It is also interesting to consider that at any time before the revocation authorized by this particular statute the Indian could have alienated his land. In that event, the taxes which had been collected would not have been subject to refund, and the patent originally issued would not have been subject to cancellation, for this act definitely provides that it shall not apply if the Indian fee patentee has mortgaged or sold any part of the land described in his patent.

The language of the brief of the respondent invokes the sympathy of the court for the poor Indian who has been mulcted out of his money by a hard-hearted county. The county stands ready here to refund the money which was paid to it by the Indian. If any equity to recover interest exists in favor of the Indian, that equity exists as against the Federal Government alone, for the acts of the Federal Government induced the Indian to pay and the county to collect the disputed tax.

The respondent's brief cites two cases in which interest on taxes paid by an Indian allottee was included in a judgment for recovery of taxes unlawfully collected; the cases cited being *Ward* v. *Love County*, 253 U. S. 17, and *McCurdy* v. *United States*, 264 U. S. 484.

While it is conceded by respondent that the question of interest was not presented to, discussed or considered by the court, the two cases are cited as precedents for allowance of interest.

If the court had in those cases given consideration to the question of whether or not interest was recoverable and had held that the Federal rule referred to in *Billings* v. *United States, supra,* was applicable, there would have been good ground to apply it, for interest might well have been held recoverable *in accordance with the principles of equity and justice.* An examination of the two cases shows that in each of them the county, when it collected the tax, was well advised that the right to collect was disputed and probably illegal. Contrasted with those circumstances we call attention to the entire ignorance of the county in the present case of any facts which would impair the apparent validity of the fee title patent held by the Indian when these taxes were collected.

We have pointed out hereinbefore that the case of *Billings* v. *United States, supra,* 232 U. S. 261, holds interest may be collected only where to do so accords with principles of equity and justice. But there is an additional distinction that may be made between the facts in that case which led the court to award interest, and the facts in the present case. In the *Billings* case the debt was found to be due on a date certain, with full notice thereof to the debtor. As is set out in the brief of the respondent in this case (p. 24) the record is silent as to when a demand for the return of the tax money was made. So far as is shown, no specific demand was made until the filing of the suit in December, 1936. Also so far as the record shows the petitioner knew nothing of the failure of the competency commission to secure the consent of the allottee to the issuance of the fee patent, away back in 1918. Had the petitioner been advised of the full

facts of the situation, it is conceivable that it would have refunded all taxes theretofore collected and would have ceased to make future levies. Certainly the Government did nothing to advise the county until the fee patent was cancelled in 1935, some sixteen years after the county began collecting the taxes in 1919. Under the rule frequently announced by this Court interest may only be collected, in the absence of a statute or contract, as damages for money wrongfully withheld. The many cases cited by the respondent where the collection of interest was held proper are those where the debtor refused to pay or refund after full advice and knowledge that the money was due. A similar situation existed in the case of *United States* v. *Carpenter*, 84 F. (2d) 813. Beginning on page 814 of the opinion of that case, the court held as follows:

> "Redfield *v.* Ystalyfera Iron Company, 110 U. S. 174, was an action to recover customs dues illegally exacted and interest thereon. The court said:
>
> "'Interest is given on money demands as damages for delay in payment, being just compensation to the plaintiff for a default on the part of his debtor. Where it is reserved expressly in the contract, or is implied by the nature of the promise, it becomes a part of the debt, and is recoverable as of right; but where it is given as damages it is often a matter of discretion.'
>
> "Lincoln *v.* Claflin, 7 Wall. 132, speaks of interest allowable as discretionary in distinction from that allowable as a matter of law. The Redfield case was followed in United States *v.* Sandborn, 135 U. S. 271, and the principle applied in Jourolmon *v.* Ewing (C. C. A.) 80 F. 604. In the Billings case *supra* the action was to recover a tax due on a specified day by the statute which imposed it. It was payable on that day, and being payable on that day by statute it was held that interest accrued on and from that day. In the case now under consideration no statute prescribed a date

on and from which erroneous refunds should bear interest, nor the rate thereof, prior to the Act of June 22, 1936. So far as the record here discloses nothing occurred to apprise appellee that she might be required to return the refund until demand therefor was made upon her on July 15, 1933. She made no demand for the refund and may not have known, so far as the record shows, that it was a disputed question whether she was entitled to retain the refund as her own. She doubtless had no thought that it was imposed on her in trust and that she might be liable for interest from the time she received it. To now charge her with $1,100 on that account impresses us as inequitable, not demanded by any law—statutory or otherwise;'"

In the same way here. The Petitioner did not know until long years later that there was any dispute about its right to collect taxes from the Allottee. The county disbursed the money to the State of Kansas; to other municipalities and to its own obligations without any knowledge until at least 1936 that it would be called upon to make any refund. Clearly it would be directly contrary to principles of justice and equity, as specified in the *Billings* case, to now require the county to pay interest by way of damages for the withholding of money it did not hold.

There is one final consideration. The Government was the moving party all through the period when the asserted liability of the county accrued. The Indian, although competent, agreed to the inconsistent and contradictory acts of the Government. Even as to money due the Government itself interest may not be collected where there has been a long delay in the assertion of the right to recover. The case of *Sandborn* v. *United States*, 135 U. S. 271, is good authority in that respect. It was there held:

"'When the United States makes a long delay in the assertion of its right to recover back money which it is entitled to recover back, without showing some reason

or excuse for the delay, interest before the commencement of the action is not recoverable; and this is especially true when it does not appear that the defendant has earned interest upon the money improperly received by him."

The record in the present case is silent as to any reason or excuse for the long delay on the part of the Government in attempting to secure refund and it certainly does appear from the record that the county has not earned interest upon the money it collected by way of taxes from the Allottee.

We submit that it should be the holding of this Court that interest should not be recoverable.

Respectfully submitted,

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JACKSON, IN THE STATE OF KANSAS, A BODY POLITIC AND QUASI PUBLIC CORPORATION,

Petitioner,

By THOMAS M. LILLARD,
Counsel for Petitioner.

O. B. EIDSON,
DEAN SHRADER,
FLOYD W. HOBBS,
Of Counsel.

No. 720

In the Supreme Court of the United States

OCTOBER TERM, 1938

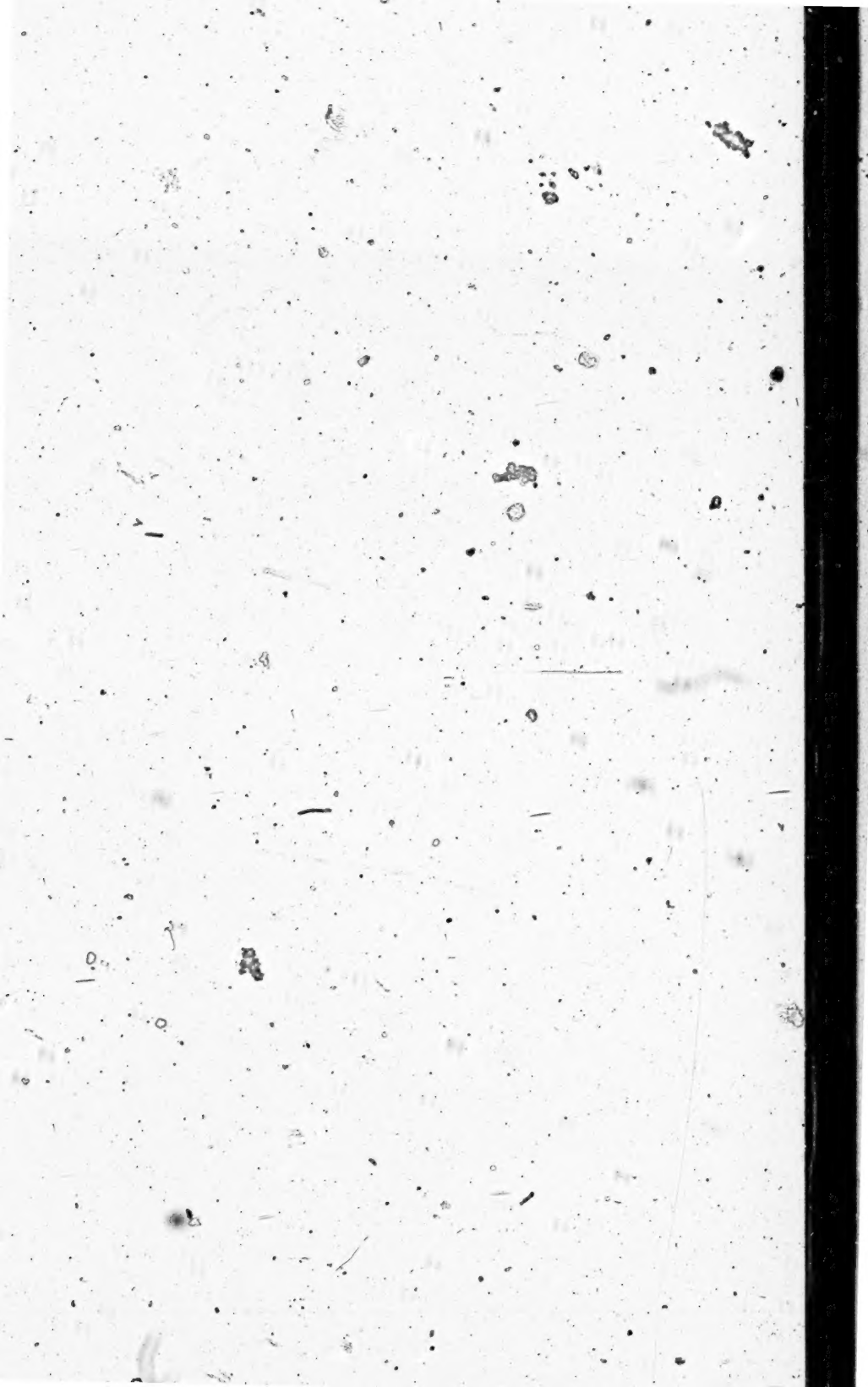
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JACKSON, IN THE STATE OF KANSAS, A BODY POLITIC AND QUASI PUBLIC CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA (M-KO-QUAH-WAH, ALLOTTEE NO. 193, AN INCOMPETENT INDIAN OF THE PRAIRIE BAND OF POTTAWATOMIE INDIANS)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES



In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 720

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JACKSON, IN THE STATE OF KANSAS, A BODY POLITIC AND QUASI PUBLIC CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA (M-KO-QUAH-WAH, ALLOTTEE NO. 193, AN INCOMPETENT INDIAN OF THE PRAIRIE BAND OF POTTAWATOMIE INDIANS)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The Government does not oppose the petition for a writ of certiorari in this case.

The court below held that the United States was entitled to recover interest from a county on taxes illegally collected by the county on tax-exempt Indian allotments. While it is believed that the conclusion reached below is correct, the Government

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desires that the question be reviewed by this Court. As stated in the petition, the decision below is in conflict with the decisions of the Circuit Court of Appeals for the Ninth Circuit in *United States* v. *Nez Perce County, Idaho*, 95 F. 2d 232, 238; *United States* v. *Lewis County, Idaho*, 95 F. 2d 236, 238; and *Glacier County, Montana* v. *United States*, 99 F. 2d 733. The question presented is of public importance, both in its general aspects and particularly with respect to suits like the present to recover taxes illegally collected by counties on Indian allotments. Several other such suits are either pending or their institution is contemplated by the Government, in both the Ninth and the Tenth Circuits.

ROBERT H. JACKSON,
Solicitor General.

MARCH 1939.

No. 14

In the Supreme Court of the United States

OCTOBER TERM, 1939

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JACKSON, IN THE STATE OF KANSAS, A BODY POLITIC AND QUASIPUBLIC CORPORATION, PETITIONER

v.

THE UNITED STATES OF AMERICA (M-KO-QUAH-WAH, ALLOTTEE NO. 193, AN INCOMPETENT INDIAN OF THE PRAIRIE BAND OF POTTAWATOMIE INDIANS)

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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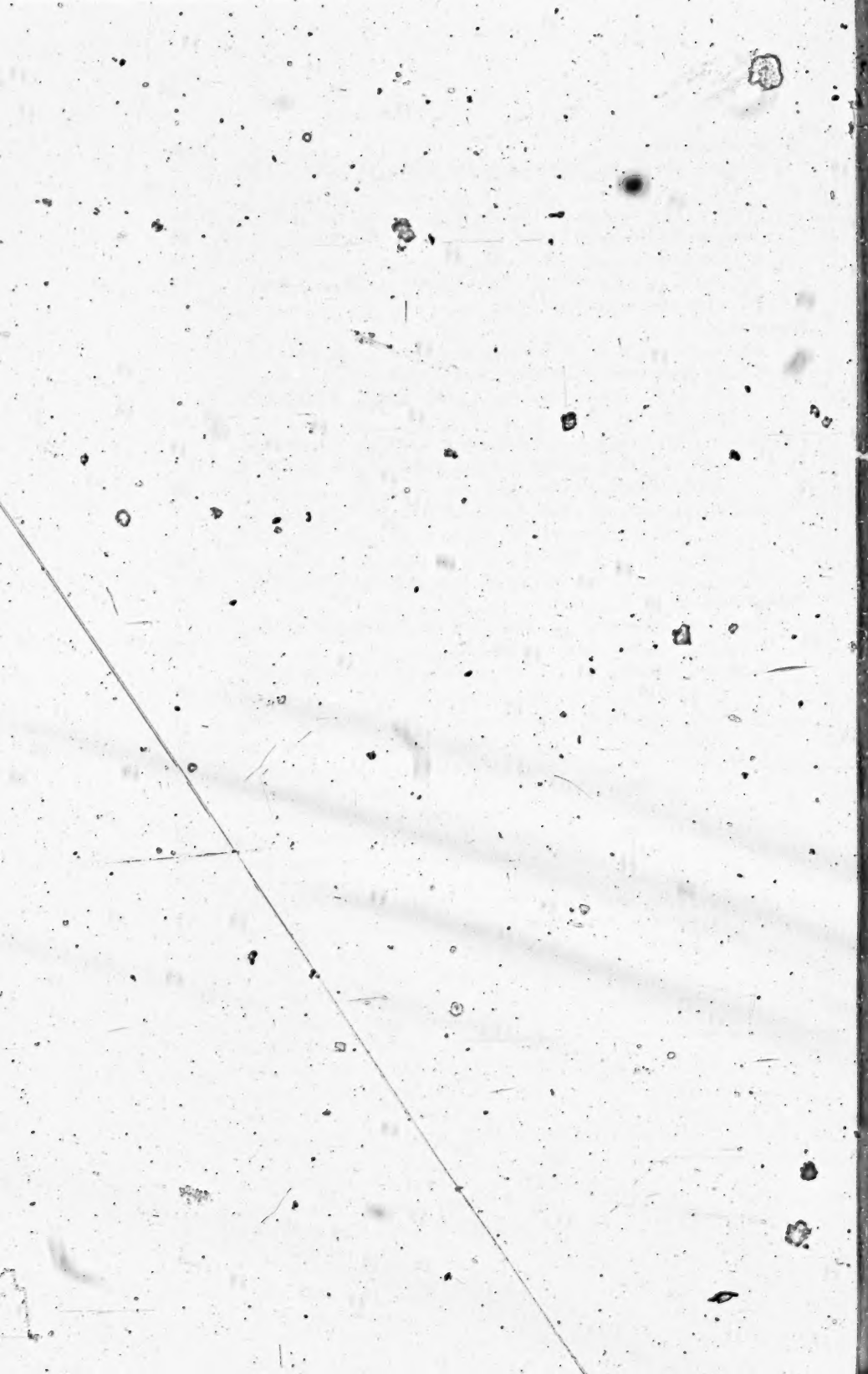

In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 14

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JACKSON, IN THE STATE OF KANSAS, A BODY POLITIC AND QUASIPUBLIC CORPORATION, PETITIONER

v.

THE UNITED STATES OF AMERICA (M-KO-QUAH-WAH, ALLOTTEE NO. 193, AN INCOMPETENT INDIAN OF THE PRAIRIE BAND OF POTTAWATOMIE INDIANS)

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 48–62) is reported in 100 F. (2d) 929.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 10, 1938 (R. 63). A petition for rehearing, filed January 9, 1939, was denied January 23, 1939 (R. 63, 65). The petition for a

writ of certiorari was filed on March 3, 1939, and was granted on April 17, 1939. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The petitioner illegally collected taxes on land of a restricted Indian allottee which was exempt from all taxation by virtue of Acts of Congress and treaties between the United States and the Indians. The United States recovered for the allottee the amounts collected as taxes, together with interest from the dates of payment. The questions are:

1. Whether the United States suing as guardian for the Indian allottee is entitled to interest on the money involuntarily paid as taxes during the period such money was wrongfully retained by the county.

2. Whether the decisions or statutes of Kansas limit or defeat the right to such interest.

TREATIES AND STATUTES INVOLVED

The applicable provisions of the treaties and statutes involved will be found in the Appendix, *infra*, pp. 36–39.

STATEMENT

In 1893 a trust patent covering certain farm land situated within the State of Kansas was issued to M-Ko-Quah-Wah, an incompetent, full-blood Pottawatomie Indian (R. 19–21, 28). Pursuant to the terms of the General Allotment Act of 1887 and in

fulfilment of an obligation of the Treaty of 1861 (*infra*, pp. 36–38), the United States in the patent agreed to hold the land in trust for this allottee or her heirs for twenty-five years or, in the discretion of the President, for an extended period, and at the end of such trust period to convey to her the land in fee "discharged of said trust and free of all charge or incumbrance whatsoever" (R. 20). The trust period was extended for twenty years by executive orders dated July 30, 1918, and April 16, 1928 (R. 21), and was extended indefinitely by Act of Congress, June 18, 1934, c. 576, Sec. 2, 48 Stat. 984.

In 1918, over the objection of the allottee, a fee simple patent was substituted for the trust patent (R. 22, 23–24, 25). The allottee's land was placed on the county tax rolls in the spring of 1919 (R. 35), and taxes (including several penalties) were collected for the years 1919–1933 (R. 8). In 1927 Congress passed an Act (44 Stat. 1247) authorizing the Secretary of the Interior to cancel fee simple patents issued without the consent of the allottee before the expiration of the trust period (R. 25). Pursuant to the terms of this Act, the fee simple patent issued to M-Ko-Quah-Wah was cancelled in 1935 (R. 25–26).

On December 23, 1936, the United States as guardian of the allottee instituted this action in the United States District Court for the District of Kansas to recover the sums paid in taxes, totaling $1,966.13, and interest thereon from the respective

dates of payment (R. 1–5, 26). The case was submitted to a jury with instructions to allow interest at 6% upon all sums paid involuntarily to the county by the allottee (R. 41–42). The jury returned a verdict in favor of the Government for principal and interest in the sum of $3,277.49 (R. 47). A judgment entered in accordance with the verdict was affirmed in all particulars by the Circuit Court of Appeals (R. 63).

The petition for a writ of certiorari to this Court does not challenge the right of the United States to recover taxes paid with interest from the date of judgment (Pet. 3, 6, 9). The sole contention of the petitioner is that the court erred in awarding interest from the dates the taxes were illegally collected to the date of the judgment (Br. 9).

SUMMARY OF ARGUMENT

I

The tax exemption asserted on behalf of the Indian allottee was conferred by Congress in pursuance of a treaty obligation and in the exercise of its plenary power over the Indians. Accordingly, the exemption is a federal right and its scope is determined by federal law. *Carpenter* v. *Shaw*, 280 U. S. 363, 367; *United States* v. *Rickert*, 188 U. S. 432.

A broad construction of the tax exemption in favor of the allottee should be given under the liberal rules of construction applicable to Indian grants. *United States* v. *Shoshone Tribe*, 304 U. S. 111,

116; *Carpenter* v. *Shaw*, 280 U. S. 363, 366–367. The Indian under such a liberal construction is entitled to an outright exemption from enforced contributions for the maintenance of local governments. *Choate* v. *Trapp*, 224 U. S. 665; cf. *United States* v. *Osage County*, 251 U. S. 128, 133. This clearly precludes the existence of any right in terms to demand from the allottee the uncompensated use of her money or property for the support of the county.

Implicit in the exemption is the right of the allottee to obtain restitution in the event it is violated and the right to be restored to the position she would have occupied had the exemption been respected. *Carpenter* v. *Shaw*, 280 U. S. 363; *Ward* v. *Love County*, 253 U. S. 17. The claim of the allottee for interest is merely an assertion of the right to be made whole for the enforced use of her money in violation of the exemption.

The federal courts clearly recognize that full restitution requires the payment of interest for money wrongfully detained. *Billings* v. *United States*, 232 U. S. 261, 284–288. The doctrine that interest does not run against the sovereign has no bearing upon the scope of the exemption from local taxes conferred by Congress upon the allottee. This Court has, without discussion, affirmed or reinstated judgments which allowed interest against a county on taxes wrongfully collected from Indian allottees. *Ward* v. *Love County*, 253 U. S. 17; *McCurdy* v. *United States*, 264 U. S. 484.

Since there are no special circumstances to limit the scope of the exemption here, this Court should construe the exemption to include interest. To hold otherwise would be to ignore the liberal rules of construction applicable to Indian grants and to permit a disguised tax in the form of the enforced use of the money of the allottee.

II

The Kansas courts have not determined that an Indian allottee is not entitled to interest on taxes wrongfully collected by a county. Accordingly, the federal courts in the exercise of a sound discretion may apply established federal principles where interest is claimed. *Concordia Ins. Co.* v. *School Dist.*, 282 U. S. 545, 551.

The state law, if contrary, must yield to the superior federal rule. It is settled beyond controversy that the power of Congress over the Indians in Kansas is plenary. *The Kansas Indians*, 5 Wall. 737, 755–756; *Sage* v. *Hampe*, 235 U. S. 99, 106. This Court in a number of cases has declared inapplicable state laws or decisions which abridged rights conferred by Congress upon the Indians. *United States* v. *Rickert*, 188 U. S. 432; *Bunch* v. *Cole*, 263 U. S. 250; *Carpenter* v. *Shaw*, 280 U. S. 363. The conflict need not be direct or immediate; a possible interference with the policy of the federal law may render the state doctrine inapplicable. *Sage* v. *Hampe*, 235 U. S. 99; cf. *Tullock* v. *Mulvane*, 184 U. S. 497. A suit by the United States

on behalf of its Indian wards cannot be defeated by either substantive or procedural rules of state law. *Carpenter* v. *Shaw*, 280 U. S. 363, 369; *Davis* v. *Wechsler*, 263 U. S. 22, 24. Neither fiscal arrangements nor local doctrines of estoppel bind the United States suing on behalf of its ward. *Cramer* v. *United States*, 261 U. S. 219, 234, *Ward* v. *Love County*, 253 U. S. 17, 24. There can be no reliance upon immunity to suit. *United States* v. *Minnesota*, 270 U. S. 181; *Chicot County* v. *Sherwood*, 148 U. S. 529.

The doctrine asserted by the petitioner is opposed to the established federal rule and would constitute a substantial encroachment upon the right of the allottee to complete tax exemption.

ARGUMENT

I

THE INDIAN ALLOTTEE HAS A FEDERAL RIGHT TO TAX EXEMPTION AND TO INTEREST ON TAXES WRONGFULLY COLLECTED

A. THE EXEMPTION IS A FEDERAL RIGHT, AND ITS SCOPE IS DETERMINED BY FEDERAL LAW

The Treaty with the Pottawatomies of November 15, 1861,[1] directed the Commissioner of Indian Affairs to assign in severalty to members of that tribe certain tracts of land which were to be "exempt from levy, taxation, or sale." The trust patents issued in fulfillment of that treaty and pur-

[1] 12 Stat. 1191 (Art. 2), as supplemented by the Treaty of March 29, 1866, 14 Stat. 763.

suant to the General Allotment Act of 1887[2] bound the United States to convey the land "free of all charge or incumbrance whatever" at the end of the trust period. Such patents have uniformly been construed to grant to the Indians a broad exemption from all forms of taxation affecting the land. *Carpenter* v. *Shaw*, 280 U. S. 363; *Choate* v. *Trapp*, 224 U. S. 665, 673; *United States* v. *Rickert*, 188 U. S. 432, 437; *The Kansas Indians*, 5 Wall. 737, 757.[3] The provision for the exemption confers upon the allottees property rights which are within the protection of the Fifth Amendment and hence are not subject to repeal by later Congressional legislation (*Choate* v. *Trapp*, 224 U. S. 665) and the restriction, being one imposed in the exercise of the plenary power of Congress over the tribal lands and in the performance of its duty as guardian of its In-

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[2] 24 Stat. 388 (sec. 5), as amended by Act of May 8, 1906, c. 2348, 34 Stat. 182; Act of February 26, 1927, c. 215, 44 Stat. 1247; Act of February 21, 1931, c. 271, 46 Stat. 1205; and Wheeler-Howard Act of June 18, 1934, c. 576, 48 Stat. 984.

[3] See also *Board of Comm'rs of Tulsa County, Okla.* v. *United States*, 94 F. (2d) 450 (C. C. A. 10th); *United States* v. *Benewah County*, 290 Fed. 628 (C. C. A. 9th); *United States* v. *Nez Perce County, Idaho*, 95 F. (2d) 232 (C. C. A. 9th); *Morrow* v. *United States*, 243 Fed. 854 (C. C. A. 8th); *United States* v. *Board of County Comm'rs*, 13 F. Supp. 641 (N. D. Okla.); *United States* v. *Dewey County, S. D.*, 14 F. (2d) 784 (S. D.); aff'd *sub nom. Dewey County, S. D.* v. *United States*, 26 F. (2d) 434 (C. C. A. 8th), certiorari denied, 278 U. S. 649; *United States* v. *Board of Comm'rs*, 6 F. Supp. 401 (W. D. Okla.); *United States* v. *Chehalis County*, 217 Fed. 281 (W. D. Wash.).

dian wards,[4] is a limitation upon the taxing power of the state. *Carpenter* v. *Shaw,* 280 U. S. 363; *The Kansas Indians,* 5 Wall. 737.

The allotment upon which the taxes were levied here concededly was exempt from taxation during the years 1919 to 1933.[5] The scope of the protection afforded by similar exemptions has been delineated on several occasions by this Court. These decisions establish a settled rule that the scope of the right thus given by Congress must be determined by federal law. See *Carpenter* v. *Shaw,* 280 U. S. 363, 367; *United States* v. *Rickert,* 188 U. S. 432, 442–443. No matter in what form the problem arises, it is a federal question whether a federal right has been encroached upon either directly or in substance and effect. *Ward* v. *Love County,* 253 U. S. 17, 22. "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. * * * The principle is general and necessary." *Davis* v. *Wechsler,* 263 U. S. 22, 24.

B. THE EXEMPTION INCLUDES INTEREST AS PART OF RESTITUTION OF TAXES WRONGFULLY COLLECTED

1. Indian rights and exemptions are broadly construed

The scope of the exemption conferred by Congress on the allottee should not be fixed with a

[4] See *Lone Wolf* v. *Hitchcock,* 187 U. S. 553, 565.

[5] Petition for certiorari, pp. 3, 6, 9. See cases cited in note 3, *supra.*

grudging hand. "While in general tax exemptions are not to be presumed and statutes conferring them are to be strictly construed, * * * the contrary is the rule to be applied to tax exemptions secured to the Indians by agreement between them and the national government. * * * Such provisions are to be liberally construed. Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *Carpenter* v. *Shaw*, 280 U. S. 363, 366. The sound reasons impelling this liberal rule of construction for Indian rights have been explained in numerous decisions of this Court. See *Worcester* v. *Georgia*, 6 Pet. 515, 582; *The Kansas Indians*, 5 Wall. 737, 760; *Jones* v. *Meehan*, 175 U. S. 1, 10–11; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 402; *United States* v. *Celestine*, 215 U. S. 278, 290; *United States* v. *Shoshone Tribe*, 304 U. S. 111, 116. The principles laid down in these cases, which hold the United States as trustee to an exacting standard of fair dealing with its wards, require an equally careful safeguarding of their rights from infringement by others less concerned with their welfare.*

2. The allottee is entitled to full restitution

The present use of money is itself a thing of value, and, if the allottee could in terms be forced

* Cf. *United States* v. *Kagama*, 118 U. S. 375, 384.

to contribute it to the local government, the value of her exemption would be materially lessened. See *Procter & Gamble Distributing Co.* v. *Sherman*, 2 F. (2d) 165, 166 (S. D. N. Y.). The immunity which the Indians understood was being granted (*Jones* v. *Meehan*, 175 U. S. 1, 11) would thus seem to forbid an enforced use, just as surely as an outright taking, by taxation, of her money. The inclusive character of the exemption is shown by *Choate* v. *Trapp*, 224 U. S. 665, and *United States* v. *Rickert*, 188 U. S. 432, where the collection of taxes wrongfully levied upon restricted Indians was enjoined. Similar relief might be given notwithstanding the requirement of a state that her citizens pay first and litigate later. Cf. *United States* v. *Osage County*, 251 U. S. 128, 133. The decisions of this Court which have stricken down other attempts to encroach upon the tax exemption conferred by Congress also impel a denial of the right of a county to require in terms from a restricted allottee a contribution in the form of the use of his money or property. *Carpenter* v. *Shaw*, 280 U. S. 363; *Choate* v. *Trapp*, 224 U. S. 665; *United States* v. *Rickert*, 188 U. S. 432, 437.

Congress has made no express provision for restitution in the event the right of its ward to tax exemption is violated. Nevertheless, this Court has directed the restitution of taxes illegally collected under compulsion. *Carpenter* v. *Shaw*, 280 U. S. 363; *Ward* v. *Love County*, 253 U. S. 17.

Since the state law in both of these cases forbade recovery, the decisions stand for the proposition that the right to restitution under such circumstances is implicit in the federal right to tax exemption. Restitution is incomplete unless compensation is given, by way of interest, for the deprivation of the use of the money illegally collected. The infringement in the case of a forced *use* of the allottee's money without restitution is comparable to that in the case of a forced *collection* of her money without restitution. The fact that the restitution sought for the forced use of the money of the allottee is called "interest" does not alter the nature of the claim. The allottee is seeking to be restored to the position she would have occupied had her exemption not been violated. To refuse to make the allottee whole would be to ignore the liberal rule of construction rightfully invoked in favor of the Indian and to narrow unduly the exemption granted by the United States.

3. Interest is generally a part of full restitution

The federal courts clearly recognize that full restitution requires the payment of interest for the wrongful detention of money or property. *Young* v. *Godbe*, 15 Wall. 562, 565; *National Home* v. *Parrish*, 229 U. S. 494; *Billings* v. *United States*, 232 U. S. 261, 284–285; *Standard Oil Co.* v. *United States*, 267 U. S. 76, 79; *Concordia Ins. Co.* v. *School Dist.*, 282 U. S. 545; *United States* v. *Creek*

Nation, 295 U. S. 103; *Ticonic Bank* v. *Sprague*, 303 U. S. 406, 410.[7] The currently accepted views were well summed up by Judge Learned Hand:

> Whatever may have been our archaic notions about interest, in modern financial communities a dollar today is worth more than a dollar next year, and to ignore the interval as immaterial is to contradict well-settled beliefs about value. The present use of my money is itself a thing of value, and, if I get no compensation for its loss, my remedy does not altogether right my wrong.[8]

The myriad decisions dealing with interest show that the right to recover taxes wrongfully withheld differs in no essential feature from the right to recover other sums. This Court as a matter of general principle, without authority of statute, has established the right of the Government to collect interest on delinquent taxes. *Billings* v. *United States*, 232 U. S. 261, 284–288. Nor is this right to interest confined to the United States, for all litigants may recover interest on taxes wrongfully collected so long as the suit in form is not against the United States. *Billings* v. *United States*,

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[7] See also *Railroad Credit Corp.* v. *Hawkins*, 80 F. (2d) 818, 826 (C. C. A. 4th), certiorari denied, 298 U. S. 667; *Wabash Ry. Co.* v. *Koenig*, 274 Fed. 909, 912 (C. C. A. 8th), certiorari denied, 257 U. S. 660.

[8] *Procter & Gamble Distributing Co.* v. *Sherman*, 2 F. (2d) 165, 166 (S. D. N. Y.); see also *Nutt* v. *Ellerbe*, 56 F. (2d) 1058 (E. D. S. C.).

supra; *Redfield* v. *Bartels*, 139 U. S. 694; *Erskine* v. *Van Arsdale*, 15 Wall. 75, 77.[9]

The right of the taxpayer to interest, as an essential element of full restitution, is illustrated by the cases holding the remedy at law to be inadequate and granting equitable relief in cases where the state has not provided for interest on taxes legally refundable. *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 386 n.; *Procter & Gamble Distributing Co.* v. *Sherman*, 2 F. (2d) 165 (S. D. N. Y.); cf. *California* v. *Latimer*, 305 U. S. 255, 261.

The decisions dealing with moratoria statutes likewise have emphasized the need to provide for payment of the debt in full *with interest* as a necessary requirement of validity. *Louisville Bank* v. *Radford*, 295 U. S. 555, 575, 579, 581, 591, 592; *Worthen Co.* v. *Kavanaugh*, 295 U. S. 56, 61; *Home Bldg. & L. Assn.* v. *Blaisdell*, 290 U. S. 398, 445. Similarly, the payment of interest as a part of just compensation has been held to be a constitutional requirement in eminent domain proceedings. *Jacobs* v. *United States*, 290 U. S. 13, 17; cf. *United States* v. *Creek Nation*, 295 U. S. 103.[10]

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[9] See also *National Home* v. *Parrish*, 229 U. S. 494, 496; *Haiku Sugar Co.* v. *Johnstone*, 249 Fed. 108, 109 (C. C. A. 9th); *New York Mail & Newspaper Transp. Co.* v. *Anderson*, 234 Fed. 590, 595 (C. C. A. 2d); *Herold* v. *Shanley*, 146 Fed. 20, 24 (C. C. A. 3d); *Pennsylvania Co.* v. *McClain*, 105 Fed. 367, 371 (C. C. E. D. Pa.), aff'd, 108 Fed. 618 (C. C. A. 3d); *Park* v. *Gilligan*, 293 Fed. 129, 132 (S. D. Ohio); *Boston & P. R. Corp.* v. *Gill*, 257 Fed. 221 (D. Mass.).

[10] See also *Seaboard Airline Ry.* v. *United States*, 261 U. S. 299, 306; *United States* v. *Rogers*, 255 U. S. 163, 169;

Interest, as an element of full restitution, is not given, in the absence of statutory authority or contractual undertaking, where suit is brought against the United States. *Smyth* v. *United States,* 302 U. S. 329, 353, and cases cited. This exception to the general principle, however, is based primarily upon the immunity of the United States to suit (see *infra,* pp. 17–18) and reaches no farther than its foundation. The variety of cases in which the exception is narrowly applied reinforces the rule that interest should generally be paid in order to make full restitution. Thus, in suits against the collector, the Government's lack of privity is nominal only.[11] Yet this Court has recognized that interest may be allowed in a suit against him for money collected as taxes and wrongfully withheld. *Billings* v. *United States,* 232 U. S. 261, 284–288; *Redfield* v. *Bartels,* 139 U. S. 694; *Erskine* v. *Van Arsdale,* 15 Wall, 75, 77.[12]

Phelps v. *United States,* 274 U. S. 341, 344; cf. *Shoshone Tribe* v. *United States,* 299 U. S. 477, 496; *United States* v. *Klamath Indians,* 304 U. S. 119, 123.

[11] No action for trespass can be brought against the collector after he has paid the taxes into the Treasury pursuant to his statutory duty, and whatever remedy the taxpayer may have is solely the creation of the statute. *Schoenfeld* v. *Hendricks,* 152 U. S. 691, 693; *Auffmordt* v. *Hedden,* 137 U. S. 310, 329. Where the collector has performed a ministerial duty, commanded by his superior, he is entitled as of right to a certificate preventing the issuance of execution upon the judgment, which is paid out of the Treasury. *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, 380–381.

[12] See cases cited in note 9, *supra.*

The rule that the United States is not liable for interest in the absence of statute or express agreement has been severely restricted in other situations. It has not been applied in suits against subordinate agencies of the Federal Government;[13] in admiralty cases where a cross-libel is filed against the United States;[14] in claims for violation of the law of prize;[15] in suits on war-risk insurance policies issued by the United States;[16] in claims against the Alien Property Custodian;[17] and the Director of Railroads.[18] Indeed, the more recent decisions of this Court evidence some tendency to give interest against the United States in situations where formerly it was denied. Compare *United States* v. *North American Co.*, 253 U. S. 330, with *Jacobs* v. *United States*, 290 U. S. 13, 18; and *Angarica* v. *Bayard*, 127 U. S. 251, with *Henkels* v. *Sutherland*, 271 U. S. 298, 301–302.

The principle of all these decisions is that full restitution requires the payment of interest on property or money wrongfully detained. Even in the case of unliquidated damages, when necessary

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[13] *National Home* v. *Parrish*, 229 U. S. 494, 496.

[14] *United States* v. *Thelka*, 266 U. S. 328, 341; *Naamlooze Vennootschap, etc.* v. *Moran Towing & Transp. Co.*, 11 F. (2d) 377 (S. D. N. Y.).

[15] *The Nuestra Senora de Regla*, 108 U. S. 92; *The Paqueta Habana*, 189 U. S. 453.

[16] *Standard Oil Co.* v. *United States*, 267 U. S. 243, 257.

[17] *Miller* v. *Robertson*, 266 U. S. 243, 257.

[18] *Standard Oil Co.* v. *Payne*, 220 Mich. 663, certiorari denied, 263 U. S. 699.

in order to arrive at fair compensation, the federal courts in the exercise of a sound discretion include interest or its equivalent as an element of damages. *Concordia Ins. Co.* v. *School Dist.*, 282 U. S. 545, 554. Neither statute nor express agreement need be found to allow interest where full restitution requires it. *Young* v. *Godbe*, 15 Wall. 562, 565; *Billings* v. *United States*, 232 U. S. 261, 284–288.[19]

4. It is immaterial that interest does not usually run against the Government

The doctrine that interest does not run against the Government in the absence of statute or contract evincing a contrary intention[20] has no application to the present situation.

The cases show the rule to be based upon an interpretation of the intention of Congress. *United States* v. *Ferraira*, 13 How. 40; *Gordon* v. *United States*, 7 Wall. 188; *United States ex rel. Angarica*

[19] In controversies between nations interest is usually payable upon money unlawfully detained. 6 Moore, Digest of International Law (1906) pp. 1028–1029; Ralston, Law and Procedure of International Tribunals (1926) Secs. 210–212; Eagleton, Measure of Damages in International Law (1929) 39 Yale L. J. 52, 75; *The Nuestra Senora de Regla*, 108 U. S. 92, 104; Vergil's Award, 4 Moore, International Arbitrations (1898) p. 4390; *Russia* v. *Turkey*, Scott, Hague Court Reports (1916) pp. 297, 309 *et seq.*

[20] *Smyth* v. *United States*, 302 U. S. 329, 353; *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 304; *United States* v. *North American T. & T. Co.*, 253 U. S. 330, 336; *United States* v. *North Carolina*, 136 U. S. 211; *United States ex rel. Angarica* v. *Bayard*, 127 U. S. 251.

v. *Bayard*, 127 U. S. 251.[21] Since the Executive Departments early adopted the practice of refusing interest in the absence of express authorization,[22] the failure to provide for interest would indicate, in the absence of other factors, the intention of Congress not to allow it. That the congressional intent, read in the light of the sovereign immunity, is the basis for the rule is indicated by the cases which allow interest against the United States wherever the circumstances reasonably indicate that its allowance would meet the approval of the Congress. *United States* v. *McKee*, 91 U. S. 442, 451; *United States* v. *Blackfeather*, 155 U. S. 180, 192; *Standard Oil Co.* v. *United States*, 267 U. S. 76.[23] It is likewise shown by the cases (*supra*, pp. 15–16) allowing interest where the Government, though not the formal defendant, is the real party in interest.

The practical reasons of government for refusing the allowance of interest against the United States in the absence of express Congressional

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[21] The consent of the United States to be sued is a privilege that may be withdrawn or qualified at any time. *De Groot* v. *United States*, 5 Wall. 419, 432; *Schillinger* v. *United States*, 155 U. S. 163, 166, 168; *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 234. The right of a claimant to recover interest from the Treasury, accordingly, depends upon the breadth of the privilege granted by Congress.

[22] See *United States ex rel. Angarica* v. *Bayard*, 127 U. S. 251, 260; 1 Op. A. G. 268, 550, 554; 3 *id.* 635; 4 *id.* 14, 136, 286; 5 *id.* 105; 7 *id.* 523; 9 *id.* 57, 449.

[23] Cf. *United States* v. *New York*, 160 U. S. 598, 619–624; *United States* v. *Old Settlers*, 148 U. S. 427, 478.

consent have little bearing upon the scope of the right granted to the allottee here. The tax exemption was promised by treaty and conferred by patent in pursuance of a plan to encourage the Indians in achieving economic independence and adopting the habits of civilized life.[24] Freedom from the burden of local government maintenance was a reasonable and necessary part of this general scheme. There is no basis for assuming that the United States was concerned with restricting the restitution recoverable from local government units that encroached upon the exemption and enforced contribution from Indian wards in violation of express Congressional policy. On the contrary, the property conferred upon its wards in furtherance of the Congressional plan could be adequately protected from encroachments by local, and frequently hostile,[25] communities only by permitting full restitution. From the standpoint of the Indian ward, full restitution would clearly be implicit in the exemption under the liberal rule of construction established by the decisions of this Court.

The decision in *United States* v. *North Carolina*, 136 U. S. 211, relied upon by the petitioner (Br. 10), does not aid its case. There the United States sought to recover, on state bonds payable to a state railroad company or bearer, interest from the date

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[24] See *United States* v. *Rickert*, 188 U. S. 432, 437; *United States* v. *Pelican*, 232 U. S. 442, 450-451.

[25] See *United States* v. *Kagama*, 118 U. S. 375, 384.

of maturity to the date of payment. This Court, denying recovery, pointed out that the laws of the state under which the bonds were issued required their redemption at the end of 30 years, that the bonds by their terms bore interest only until maturity, and that the state officers had no authority to stipulate for interest for any subsequent period. The statutes of North Carolina were, of course, a part of the contract upon which the United States based its claim. In buying North Carolina bonds the United States as assignee acquired only the rights of its assignor. *Guaranty Trust Co.* v. *United States,* 304 U. S. 126. See also *United States* v. *Nashville C. & St. L. Ry. Co.,* 118 U. S. 120, 125. Hence, like any other holder of North Carolina bonds, it was bound by the provisions under which the paper was issued and accepted. Cf. *South Dakota* v. *North Carolina,* 192 U. S. 286, 321; *United States* v. *Barker,* 12 Wheat. 559. The North Carolina law did not conflict with any federal statute or constitutional provision, and was therefore applicable. Cf. *United States* v. *Belmont,* 301 U. S. 324, 331–332; *Mason* v. *United States,* 260 U. S. 545; *Wooden-Ware Company* v. *United States;* 106 U. S. 432, 436.

The United States, in allotting lands to the Pottawatomie Indians, clearly did not consent to be bound by any state statute or decision which would deprive the Indians of vested federal rights. Compare *United States* v. *Guaranty Trust Co.,* 293

U. S. 340, 346. Neither expressly nor impliedly has the United States waived the right of the allottee to obtain complete recovery for all damages resulting from such interference. The allowance of interest as compensation for depriving the allottee of the use of her money is implicit in the "due recognition" of the exemption promised by treaty and confirmed by act of Congress. *Ward* v. *Love County*, 253 U. S. 17, 22.

5. This Court has allowed interest in similar cases

In at least two cases this Court has affirmed or reinstated judgments requiring a county to pay interest on taxes wrongfully collected from Indian allottees.[26]

Ward v. *Love County*, 253 U. S. 17, was concerned with the suit of sixty-seven restricted Indians for the return, with interest, of taxes wrongfully collected by Love County, Oklahoma. When the County refused to plead further after its demurrer was overruled, the trial court entered a judgment for the plaintiffs for $10,164.24, of which $2,340.89 represented interest on the taxes from the date of payment to the date of judgment. The judgment of the Supreme Court of Oklahoma (68 Okla. 278), reversing the trial court, was in turn

[26] Interest is not recoverable under later decisions of the highest court of the State in which the cases arose. *Eaton* v. *St. Louis-Santa Fe Ry. Co.*, 122 Okla. 143; *Brown* v. *Board of Education*, 148 Okla. 97; *Board of County Comm'rs* v. *City of Marlow*, 148 Okla. 126.

reversed by this Court in an opinion holding that "money got through imposition" may be recovered back, and that restitution or compensation would be compelled, independent of any statute, where a county obtains money without authority. This Court fully understood that interest was included because the opinion declares (p. 20) that the total claim was "$7,823.35, aside from interest."

In *McCurdy* v. *United States*, 264 U. S. 484, the United States brought suit against the treasurer of Osage County, Oklahoma, to enjoin the collection of certain state taxes and to recover taxes already paid by Indian allottees "together with interest at the rate of six percent per annum from the date of the unlawful collection of such moneys until the date the same shall be refunded" (Record, *McCurdy* v. *United States*, No. —, Oct. Term, 1922, p. 10). The judgment of the federal District Court dismissing the Government's bill was reversed by the Circuit Court of Appeals "with instructions to grant the relief prayed for." *United States* v. *McCurdy*, 280 Fed. 103, 105 (C. C. A. 8th). The decision of the Circuit Court of Appeals was in turn affirmed by this Court, *sub nom. McCurdy* v. *United States*, 264 U. S. 484.

While the question of interest was not discussed in either of the foregoing cases, the decisions are entitled to consideration, for it was in partial reliance on similar precedents that this Court allowed interest in *Billings* v. *United States*, 232 U. S. 261, 284–285.

6. No special circumstances restrict the right

Contrary to the contention made by the petitioner, neither the Government nor the allottee is estopped, by virtue of facts existent here, to claim interest on taxes paid involuntarily by the incompetent allottee. The unauthorized issuance of a fee simple patent did not bind the Government; much less could it deprive the incompetent Indian of vested rights. *Cramer* v. *United States*, 261 U. S. 219, 234, and cases cited. See *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 409. The allottee's conduct has not been inequitable. Through no fault of hers and over her objection, she was deprived of her tax exemption for the years 1919–1933. The position of this allottee as an incompetent ward of the Government clearly precludes any finding of misconduct on her part.[27] She has an exemption binding on the United States as well as the State of Kansas and its political subdivisions. *Choate* v. *Trapp*, 224 U. S. 665; *Ward* v. *Love County*, 253 U. S. 17.

The finding of the jury that the taxes were paid involuntarily (R. 41–42) establishes the right of the allottee to interest for the entire period elapsed between the time of payment and the date of the judgment. The amount improperly collected was a liquidated sum which the county admittedly had

[27] See *United States* v. *Minnesota*, 270 U. S. 181, 196; *Board of Comm'rs of Caddo County, Okla.* v. *United States*, 87 F. (2d) 55, 57 (C. C. A. 10th); *United States* v. *Benewah County*, 290 Fed. 628 (C. C. A. 9th).

no right to retain. No formal protest was necessary to recover the principal with interest from the date of payment. *Arkadelphia Co.* v. *St. Louis S. W. Ry. Co.*, 249 U. S. 134, 147; cf. *United States* v. *U. S. Fidelity Co.*, 236 U. S. 512, 528; *Board of Commissioners of Jackson County* v. *Kaul*, 77 Kan. 715, 719 (1908).[28] The finding that the payment was made involuntarily negatives any assumption that the payment was mistakenly made. Where taxes are paid without mistake and under compulsion, interest should be allowed from the date of payment. Those cases disallowing interest for the period prior to demand or commencement of suit are based on findings of inequity or laches not applicable to the allottee in this proceeding. See *Redfield* v. *Bartels*, 239 U. S. 694, 702; *Redfield* v. *Ystalyfera Iron Co.*, 110 U. S. 174; *United States* v. *Skinner & Eddy Corp.*, 28 F. (2d) 373 (W. D. Wash.), modified, 35 F. (2d) 889 (C. C. A. 9th).[29]

Where the claim is not inequitable interest is recoverable as a matter of course. *Lincoln* v. *Claflin*, 7 Wall. 132, 189; *Spalding* v. *Mason*, 161 U. S. 375,

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[28] Cf. *Boston & Sandwich Glass Co.* v. *City of Boston*, 4 Metc. (Mass.) 181 (1843); *Metropolitan Life Ins. Co.* v. State, 194 Ind. 657 (1924); *Chicago, St. P. M. & O. Ry. Co.* v. *Mundt*, 56 S. D. 530 (1930); *County of Galveston* v. *Galveston Gas Co.*, 72 Tex. 509 (1889); *State Tax Comm.* v. *United Verde E. Min. Co.*, 39 Ariz. 136 (1931).

[29] The record does not show when demand was first made for the return of the money wrongfully collected. Specific demand was made in the complaint, filed on December 23, 1936 (R. 1–5). The petitioner can rely on no excuse whatever for wrongfully retaining the money after that date.

396; *Miller* v. *Robertson*, 266 U. S. 243, 259. Even in cases where some element of discretion enters into the allowance of interest, the court may nevertheless direct the jury in a clear case to include interest in the verdict. *Jones* v. *United States*, 258 U. S. 40, 49. Thus it appears that the decision in the instant case should not turn upon any circumstance peculiar to this allottee but should be determined simply by the scope of the right to tax exemption granted to the Pottawatomies.

The inclusion within the scope of the exemption of interest on taxes wrongfully collected requires merely the application of sound and established rules of construction. It is manifest that without interest the allottee will not be restored to the position she would have occupied had her exemption been respected. The refusal of interest would amount in effect to the recognition of a right on the part of a county to make a forced requisition of the use value of the property of the Pottawatomies. It would thus be, in effect, a disguised tax. See *Procter & Gamble Distributing Co.* v. *Sherman*, 2 F. (2d) 165, 166 (S. D. N. Y.); *Nutt* v. *Ellerbe*, 56 F. (2d) 1058 (E. D. S. C.); *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 386n. Due regard for the defenseless position of these Indian wards of the nation clearly militates against such a restricted interpretation of their rights. The liberal rules of construction properly invoked by the allottee

impel a holding that interest is a necessary part of full restitution implicit in the right to tax exemption granted by federal statutes and treaties.

II

THE FEDERAL RIGHT TO INTEREST IS NOT DEFEATED BY STATE LAW

1. THE KANSAS LAW IS NOT IN CONFLICT.

There is no statute in Kansas which forbids the allowance of interest against a county and the decisions of the Supreme Court of Kansas have not determined whether interest may be recovered against a county by a restricted Indian allottee. An analysis of the cases cited by the petitioner discloses that the question is still open.

In *Jackson County* v. *Kaul*, 77 Kan. 715, 718, a private taxpayer, from whom taxes had been collected wrongfully, sought to recover interest under a general statute not expressly applicable to the county. The Kansas Supreme Court first declared (pp. 718–719) that the county, having collected the taxes under compulsion, had no right to retain the money for a single day and owed a duty to make restitution at once. It then held the statute inapplicable under the settled rule that a general statute does not bind the sovereign in the absence of express provision. This case has been followed without discussion in later decisions.[20]

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[20] *Hupe* v. *Sommer*, 88 Kan. 561, 567 (1913); *Salthouse* v. *McPherson County*, 115 Kan. 668, 673 (1924); *School District* v. *Kingman County Comm'rs*, 127 Kan. 292 (1929).

But it has never been applied to a proceeding brought to enforce tax exemptions conferred by Congress on its Indian wards. The favored position of the Indians, dependent upon the protection and good faith of the Government, has frequently been recognized by Kansas decisions. See *McGannon* v. *Straightlege*, 32 Kan. 524, 525 (1884); *Brown* v. *Steele*, 23 Kan. 672 (1880); *Maynes* v. *Veale*, 20 Kan. 374, 389 (1878); *Parker* v. *Winsor*, 5 Kan. 362, 367, 375 (1870). It cannot be assumed that an Indian allottee suing in Kansas to enforce rights granted by the United States would necessarily be denied interest for the wrongful detention of his money.

The decision in the *Kaul* case appears to rest upon lack of statutory authority and not upon any clear public policy forbidding the allowance of interest against a county. Thus, in *First National Bank* v. *Wabaunsee County Comm'rs*, 145 Kan. 552, interest was allowed in a suit on two ~~tax~~ warrants although no express provision was made in the ~~warrants~~ for the payment of interest. The court distinguished the *Kaul* decision and spelled out an implied agreement to pay interest for the delay in paying the money due. Similarly, interest against the county is recoverable in eminent domain proceedings. *Flemming* v. *Ellsworth County Comm'rs*, 119 Kan. 598. In view of the established federal doctrine that the wrongful detention of taxes does not differ in principle from the wrongful detention

of other money or property,[31] the *Kaul* case should not be given an extended interpretation in the federal courts.

Moreover, the rule that interest does not ordinarily run against the sovereign has been considerably restricted in the federal courts since the *Kaul* case was decided. In *National Home* v. *Parrish*, 229 U. S. 494, 496, this Court pointed out that "this exemption has never as yet been applied to subordinate governmental agencies." The federal courts have never regarded a county as having the sovereign attribute of immunity to suit, but have treated it as being in the same class with other corporate bodies. See *Marsh* v. *Fulton County*, 10 Wall. 676, 684; *Chapman* v. *County of Douglas*, 107 U. S. 348; *Chicot County* v. *Sherwood*, 148 U. S. 529; compare *Supervisors* v. *Rogers*, 7 Wall. 175; *Guardian Savings Co.* v. *Road District*, 267 U. S. 1.

Until the Kansas court has definitely spoken, the federal courts in the exercise of a sound discretion may apply established principles and include interest as an element of fair restitution. *Concordia Ins. Co.* v. *School Dist.*, 282 U. S. 545, 551; see *Jones* v. *United States*, 258 U. S. 40, 49.

B. THE KANSAS LAW, IF IN CONFLICT, MUST YIELD TO THE FEDERAL RULE

As shown in Part I (*supra*, pp. 7–26), the right to recover interest on taxes wrongfully detained is

[31] See cases cited *supra*, pp. 13–14.

implicit in the tax exemption granted by Congress. No decisions of the State of Kansas, if they be thought applicable to Indians as well as to other taxpayers, can encroach upon the federal right thus given to the Indians. Neither state statute, policy, nor court decision can curtail the right of the allottee asserted in a suit by the United States on behalf of its ward.

The decisions of this Court have established beyond controversy that in Indian matters the federal power is supreme and exclusive. *Worcester* v. *Georgia*, 6 Pet. 515; *United States* v. *Pelican*, 232 U. S. 442, 447. This is particularly true where, as here, federal supremacy rests not only upon the provisions of the Constitution but also upon the provisions of the statute setting forth the terms upon which Kansas was admitted to the Union.[32] Thus in *The Kansas Indians*, 5 Wall. 737, where Kansas attempted to deprive the Indians of their tax exemption, this Court said (p. 756):

> There can be no question of State sovereignty in the case, as Kansas accepted her admission into the family of States on condition that the Indian rights should remain unimpaired and the general government at liberty to make any regulation respecting them, their lands, property, or other rights, which it would have been competent to make if Kansas had not been admitted into the Union.

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[32] Kansas Enabling Act of January 29, 1861, c. 20, 12 Stat. 126.

Various attempts to abridge rights which Congress has conferred on its Indian wards have been struck down by this Court even though the conflict with federal policy was indirect.

In *United States* v. *Rickert*, 188 U. S. 432, a statute of South Dakota classified "all improvements made by persons upon lands held by them under the laws of the United States" as personal property. This Court enjoined the collection of taxes assessed by Roberts County upon improvements on restricted Indian allotments, and pointed out that the State classification, if upheld, would partially destroy the tax-exemption and defeat the policy of Congress embodied in the General Allotment Act. Similarly, an Oklahoma tax upon the owner of any royalty interest in petroleum and natural gas was held invalid as applied to Indian allottees despite the inisistence of the State that the tax was on the oil and gas severed from the realty. *Carpenter* v. *Shaw*, 280 U. S. 363, 367–368.

An analogous refusal to give effect to a state decision interfering with a federal right is illustrated by *Bunch* v. *Cole*, 263 U. S. 250. An Indian allottee there sued to recover for the wrongful occupancy and use of lands which he had leased to the defendants by instruments calling for a cash rental of $75.00 per annum. These leases were in excess of the powers of alienation permitted the Indian by Acts of Congress and, by the terms of those Acts, were "absolutely null and void." The Oklahoma Supreme Court admitted that the leases were void,

but so construed and applied a local statute that the leases were regarded as creating a tenancy at will and the compensation due the plaintiff was limited. This Court held that the statute, so construed and applied, was in conflict with Congressional restrictions on alienation, and therefore was invalid. Cf. *Monson* v. *Simonson*, 231 U. S. 341, 347; *Mullen* v. *Pickens*, 250 U. S. 590, 595.

Sage v. *Hampe*, 235 U. S. 99, furnishes an example of the extensive power of Congress to protect its Indian wards and of the principle, consistently recognized by the Court, that the necessities of the situation require construction of Acts of Congress so as to achieve that purpose. The case involved a contract between two white persons to convey land of Pottawatomie Indians to which the vendor could not acquire title until a restriction against alienation was removed. After the removal of the restriction the vendor failed to perform and the vendee sued for damages. The Kansas courts gave a judgment for the vendee even though the contract tended to bring improper influence to bear on the Secretary of the Interior to remove the restrictions. This Court held that the contract was opposed to the policy implicit in the General Allotment Act, and that even though Kansas upheld it, this Court would construe the Act as broad enough to interdict such an agreement. In reversing the judgment below, Mr. Justice Holmes declared (p. 106) "There can be no question that the United States can make its pro-

hibitions binding upon others than Indians to the extent necessary effectively to carry its policy out." In like manner, state provisions requiring prompt payment of taxes or their payment under formal protest, while expressing a legitimate state policy, are without effect in proceedings brought by the United States to enforce the federal rights of its Indian wards. *Carpenter* v. *Shaw*, 280 U. S. 363, 369; *United States* v. *Nez Perce County, Idaho*, 95 F. (2d) 232, 236 (C. C. A. 9th).

The cases in which this Court has protected the rights of the Indians from local encroachments are but particular examples of the general and necessary principle that a plain assertion of a federal right cannot be defeated by either substantive or procedural rules of state law. *Davis* v. *Wechsler*, 263 U. S. 22, 24; *Ward* v. *Love County*, 253 U. S. 17, 22.

Examples from other fields where state public policy must bow to federal policy, even though the conflict is indirect, may be briefly mentioned.[33] In *Tullock* v. *Mulvane*, 184 U. S. 497, this Court refused to apply a Kansas doctrine including attorney's fees as part of the "costs" covered by a surety bond given in an injunction proceeding in a

[33] The policy implicit in the National Bank Act has been held determinative, despite contrary state doctrines, of the validity of pledges of assets made to secure deposits. *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245; *Marion* v. *Sneeden*, 291 U. S. 262; *Walter F. Downey, Receiver of First National Bank & Trust Co. of Yonkers* v. *City of Yonkers*, C. C. A. 2d, decided August 3, 1939, not yet reported.

federal court. The proper construction of the bond was a federal question, since a state decision could not operate to impair the right to relief in the federal courts. Cf. *Missouri Pacific Ry. Co.* v. *Larabee,* 234 U. S. 459, 468, 471–473. *Fairmont Creamery Co.* v. *Minnesota,* 275 U. S. 70, furnishes another close analogy. There costs were assessed against the state, notwithstanding the settled doctrine of the state that the sovereign pays no costs. This Court held that the state doctrine was in conflict with its own policy of allowing costs to the successful litigant and must consequently be rejected, and the Court declared (p. 74): "Though a sovereign, in many respects, the state when a party to litigation in this Court loses some of its character as such."

Other decisions, too, clearly establish the power of the United States to maintain an action in the federal courts on behalf of its Indian wards without hindrance from conflicting doctrines of state law. The United States cannot be estopped by the acts or laches of its agents from enforcing either its own rights or those of its wards. *United States* v. *Minnesota,* 270 U. S. 181, 196; *Cramer* v. *United States,* 261 U. S. 219, 234. Nor is the United States limited to local remedies when others are needed to protect the Indians. *United States* v. *Osage County,* 251 U. S. 128, 133; see *Ward* v. *Love County,* 253 U. S. 17, 24.

There can be no reliance upon any immunity to suit in the instant case. The Eleventh Amend-

ment does not apply to a county which may be sued in the federal courts even in the absence of consent.[34] This Court has consistently held that immunity from suit cannot be permitted to defeat the declared policy of Congress in the administration and enforcement of statutes designed to protect its Indian wards. *Worcester* v. *Georgia*, 6 Pet. 515; *The Kansas Indians*, 5 Wall. 737, 756. Even the state itself cannot establish its immunity in an action brought by the United States in its sovereign capacity to enforce a federal right. *United States* v. *Texas*, 143 U. S. 621; *United States* v. *Minnesota*, 270 U. S. 181.

CONCLUSION

The rule of construction consistently applied in the decisions of this Court clearly establishes the right of the allottee to a complete tax exemption. The allowance of interest here would conform to the settled policy of this Court, and the Federal Government of dealing liberally with the claims asserted on behalf of Indian wards. The denial of interest here would extend a local doctrine beyond the limits established by the state courts, so as to create a substantial conflict with general principles of fair restitution adopted by the federal courts. It would restrict the exemption which the Indians expected to receive and sanction the im-

[34] See *Hopkins* v. *Clemson College*, 221 U. S. 636, 645; *Chicot County* v. *Sherwood*, 148 U. S. 529; *Lincoln County* v. *Luning*, 133 U. S. 529, 530; *Commissioners* v. *Sellew*, 99 U. S. 624; *Cowles* v. *Mercer County*, 7 Wall. 118.

position of a disguised tax on the lands of the allottee. The right to interest must, therefore, be considered a federal right implicit in the right to tax exemption.

The judgment of the court below should be affirmed.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.
NORMAN M. LITTELL,
Assistant Attorney General.
RAYMOND T. NAGLE,
Special Assistant to the Attorney General.
VERNON L. WILKINSON,
EDWIN E. HUDDLESON, JR.,
Attorneys.

OCTOBER 1939.

APPENDIX

Articles II and III of the Treaty of November 15, 1861, 12 Stat. 1191:

ARTICLE II. It shall be the duty of the agent of the United States for said tribe to take an accurate census of all the members of the tribe, and to classify them in separate lists, showing the names, ages, and numbers of those desiring lands in severalty, and of those desiring lands in common, designating chiefs and headmen respectively; each adult choosing for himself or herself, and each head of a family for the minor children of such family, and the agent for orphans and persons of an unsound mind. And thereupon there shall be assigned, under the direction of the Commissioner of Indian Affairs, to each chief at the signing of the treaty, one section; to each headman, one half section; to each other head of a family, one quarter section; and to each other person eighty acres of land, to include, in every case, as far as practicable, to each family, their improvements and a reasonable portion of timber, to be selected according to the legal subdivision of survey. When such assignments shall have been completed, certificates shall be issued by the Commissioner of Indian Affairs for the tracts assigned in severalty, specifying the names of the individuals to whom they have been assigned, respectively, and that said tracts are set apart for the perpetual and exclusive use

and benefit of such assignees and their heirs. Until otherwise provided by law, such tracts shall be exempt from levy, taxation, or sale, and shall be alienable in fee or leased or otherwise disposed of only to the United States, or to persons then being members of the Pottawatomie tribe and of Indian blood, with the permission of the President, and under such regulations as the Secretary of the Interior shall provide, except as may be hereinafter provided. And on receipt of such certificates, the person to whom they are issued shall be deemed to have relinquished all right to any portion of the lands assigned to others in severalty, or to a portion of the tribe in common, and to the proceeds of sale of the same whensoever made.

ARTICLE III. At any time hereafter when the President of the United States shall have become satisfied that any adults, being males and heads of families, who may be allottees under the provisions of the foregoing article, are sufficiently intelligent and prudent to control their affairs and interests, he may, at the request of such persons, cause the lands severally held by them to be conveyed to them by patent in fee simple, with power of alienation; and may, at the same time, cause to be paid to them, in cash or in the bonds of the United States, their proportion of the cash value of the credits of the tribe, principal and interest, then held in trust by the United States, and also, as the same may be received, their proportion of the proceeds of the sale of lands under the provisions of this treaty. And on such patents being issued and such payments ordered to be made by the President, such competent persons shall cease to be members of said tribe, and shall become citizens of the United States;

and thereafter the lands so patented to them shall be subject to levy, taxation, and sale, in like manner with the property of other citizens: *Provided,* That, before making any such application to the President, they shall appear in open court in the district court of the United States for the district of Kansas, and make the same proof and take the same oath of allegiance as is provided by law for the naturalization of aliens, and shall also make proof to the satisfaction of said court that they are sufficiently intelligent and prudent to control their affairs and interests, that they have adopted the habits of civilized life, and have been able to support, for at least five years, themselves and families.

Section 5 of the General Allotment Act of February 8, 1887, c. 119, 24 Stat. 388 (25 U. S. C. sec. 348):

SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided,* That the President of the United States may in any case in his discretion extend the period. * * *

Act of May 8, 1906, c. 2348, 34 Stat. 182 (25 U. S. C. sec. 349):

> * * * At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; * * * and thereafter all restrictions as to sale, encumbrance, or taxation of said land shall be removed * * *.

Act of February 26, 1927, c. 215, 44 Stat. 1247, as amended by the Act of February 21, 1931, c. 271, 46 Stat. 1205 (25 U. S. C. sec. 352a-b):

> * * * The Secretary of the Interior is hereby authorized, in his discretion, to cancel any patent in fee simple issued to an Indian allottee or to his heirs before the end of the period of trust described in the original or trust patent issued to such allottee, or before the expiration of any extension of such period of trust by the President, where such patent in fee simple was issued without the consent or an application therefor by the allottee or by his heirs: *Provided,* That the patentee has not mortgaged or sold any part of the land described in such patent: *Provided also,* That upon cancellation of such patent in fee simple the land shall have the same status as though such fee patent had never been issued.

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SUPREME COURT OF THE UNITED STATES.

No. 14.—October Term, 1939.

The Board of County Commissioners of the County of Jackson, in the State of Kansas, etc., Petitioner,
vs.
United States of America, etc.

On Writ of Certiorari to the Circuit Court of Appeals for the Tenth Circuit.

[December 18, 1939.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This case is here to review an affirmance by the Circuit Court of Appeals for the Tenth Circuit of a ruling by the District Court for the District of Kansas allowing interest in a suit for the recovery of taxes by the United States on behalf of an Indian under circumstances presently to be stated. 100 F. (2d) 929. We granted *certiorari* because of conflicting views between the Ninth and the Tenth Circuits. See *United States* v. *Nez Perce County, Idaho*, 95 F. (2d) 232.[1]

M-Ko-Quah-Wah is a full-blooded Pottawatomie Indian. In her behalf the United States asserts whatever rights she may have flowing from the Treaty of November 15, 1861, between the United States and the Pottawatomie nation of Indians, 12 Stat. 1191, and the legislation in aid of it. This Treaty made lands held by the United States in trust for the Pottawatomie Indians "exempt from levy, taxation, or sale . . .", "until otherwise provided by law. . . ." The land which gave rise to this controversy, situated in Jackson County, Kansas, was patented under the General Allotment Act of February 8, 1887, 24 Stat. 388, 25 U. S. C. § 348. In pursuance of this Act, the United States agreed to hold the land for twenty-five years under the restrictions of the 1861 Treaty, subject to extension at the President's discretion. Two ten-year extensions were made by Executive Order, one, in 1918 and the other, in 1928; and by the Act of June 18, 1934, the existing trust periods were indefinitely extended by Congress. 48 Stat. 984.

[1] This case has since been followed by the same court in United States v. Lewis County, Idaho, 91 F. (2d) 236 and Glacier County, Mont. v. United States, 99 F. (2d) 733.

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In this legislative setting, the Secretary of the Interior in 1918, over the objection of M-Ko-Quah-Wah, cancelled her outstanding trust patent and in its place issued a fee simple patent. This was duly recorded in the Registry of Deeds for Jackson County. In consequence Jackson County in 1919 began to subject the land to its regular property taxes. It continued to do so as long as this fee simple patent was left undisturbed by the United States. In 1927 Congress authorized the Secretary of the Interior to cancel fee simple patents theretofore issued over the objection of allottees. In 1935 the patent for the land in controversy was cancelled, and in the next year proceedings were begun by the United States as guardian of M-Ko-Quah-Wah to recover the taxes which Jackson County had collected, amounting to $1,966.13, with interest from the respective dates of payment. The District Court allowed interest at 6%, and a verdict for principal and interest, amounting to $3,277.49, was returned by the jury. A judgment upon this verdict was affirmed by the Circuit Court of Appeals. Jackson County does not here contest its liability for the principal, but challenges the Government's right to interest prior to judgment.

The issue is uncontrolled by any formal expression of the will of Congress. The United States urges that we must be indifferent to the law of the state pertaining to the recovery of taxes improperly levied on land within it. Jackson County, on the other hand, urges that the law of Kansas controls. It is settled doctrine there that a tax-payer may not recover from a county interest upon taxes wrongfully collected. *Jackson County* v. *Kaul*, 77 Kan. 715.

We deem neither the juristic theory urged by the Government nor that of Jackson County entirely appropriate for the solution of our problem. The starting point for relief in this case is the Treaty of 1861, exempting M-Ko-Quah-Wah's property from taxation. Effectuation of the exemption is, of course, entirely within Congressional control. But Congress has not specifically provided for the present contingency, that is, the nature and extent of relief in case loss is suffered through denial of exemption. It has left such remedial details to judicial implications. Since the origin of the right to be enforced is the Treaty, plainly whatever rule we fashion is ultimately attributable to the Constitution, treaties or statutes of the United States, and does not owe its authority to the law-making agencies of Kansas. *Cf. Erie R. Co.* v. *Tompkins*, 304 U. S. 64. And so the concrete problem is to determine the materials out

of which the judicial rule regarding interest as an incident to the main remedy should be formulated. In ordinary suits where the Government seeks, as between itself and a private litigant, to enforce a money claim ultimately derived from a federal law, thus implying a wish of Congress to collect what it deemed fairly owing according to the traditional notions of Anglo-American law, this Court has chosen that rule as to interest which comports best with general notions of equity. *United States* v. *Sanborn*, 135 U. S. 271, 281; *Billings* v. *United States*, 232 U. S. 261. Instead of choosing a rigid rule, the Court has drawn upon those flexible considerations of equity which are established sources for judicial law-making.

But the present case introduces an important factor not present in former decisions. The litigation is not between the United States and a private litigant, but between the United States and the political subdivision of a state. In effect, therefore, we have another aspect of our task in adjusting the interests of two governments within the same territory.

Nothing that the state can do will be allowed to destroy the federal right which is to be vindicated; but in defining the extent of that right its relation to the operation of state laws is relevant. The state will not be allowed to invade the immunities of Indians, no matter how skilful its legal manipulations. *United States* v. *Rickert*, 188 U. S. 432. *Cf. Bunch* v. *Cole*, 263 U. S. 250. Nor are the federal courts restricted to the remedies available in state courts in enforcing such federal rights. *United States* v. *Osage County*, 251 U. S. 128; *Ward* v. *Love County*, 253 U. S. 17. Nor may the right to recover taxes illegally collected from Indians be unduly circumscribed by state law. *Carpenter* v. *Shaw*, 280 U. S. 363. Again, state notions of laches and state statutes of limitations have no applicability to suits by the Government, whether on behalf of Indians or otherwise. *United States* v. *Minnesota*, 270 U. S. 181. *Cf. Ches. and Del. Canal Co.* v. *United States*, 250 U. S. 123. This is so because the immunity of the sovereign from these defenses is historic. Unless expressly waived, it is implied in all federal enactments.

But the recovery of interest in inter-governmental litigation has no such roots in history. Indeed, liability for interest is of relatively recent origin and the rationale of its recognition or denial is not always clear. That it is not a congenital rule in our law is indicated by its denial in *United States* v. *North Carolina*, 136 U. S. 211, on grounds of "public convenience". Since Congress

has, in the legislation implementing the Indians' tax immunity, remained silent as to recovery of interest, we need not presume that it has impliedly fixed liability for interest in a suit like the present.

Having left the matter at large for judicial determination within the framework of familiar remedies equitable in their nature, see *Stone* v. *White*, 301 U. S. 532, 534, Congress has left us free to take into account appropriate considerations of "public convenience". Cf. *Virginian Ry.* v. *Federation*, 300 U. S. 515, 552. Nothing seems to us more appropriate than due regard for local institutions and local interests. We are concerned with the interplay between the rights of Indians under federal guardianship and the local repercussion of those rights. Congress has not been heedless of the interests of the states in which Indian lands were situated, as reflected by their local laws. See, e. g., § 5 of the General Allotment Act of 1887, 24 Stat. 388, 389. With reference to other federal rights, the state law has been absorbed, as it were, as the governing federal rule not because state law was the source of the right but because recognition of state interests was not deemed inconsistent with federal policy. See *Brown* v. *United States*, 263 U. S. 78; *Seaboard Air Line R. Co.* v. *United States*, 261 U. S. 299. In the absence of explicit legislative policy cutting across state interests, we draw upon a general principle that the beneficiaries of federal rights are not to have a privileged position over other aggrieved tax-payers in their relation with the states or their political subdivisions. To respect the law of interest prevailing in Kansas in no wise impinges upon the exemption which the Treaty of 1861 has commanded Kansas to respect and the federal courts to vindicate.

Assuming, however, that the law as to interest in governmental actions based upon quasi-contractual obligations be applicable, the United States must fail here. The cases teach that interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable. *United States* v. *Sanborn*, 135 U. S. 271, 281; *Billings* v. *United States*, 232 U. S. 261.

Jackson County in all innocence acted in reliance on a fee patent given under the hand of the President of the United States. Even after Congress in 1927 authorized the Secretary of the Interior to cancel such a patent, it was not until 1935 that such cancellation

was made. Here is a long, unexcused delay in the assertion of a right for which Jackson County should not be penalized. By virtue of the most authoritative semblance of legitimacy under national law, the land of M-Ko-Quah-Wah and the lands of other Indians had become part of the economy of Jackson County. For eight years after Congress had directed attention to the problem, those specially entrusted with the intricacies of Indian law did not call Jackson County's action into question. Whatever may be her unfortunate duty to restore the taxes which she had every practical justification for collecting at the time, no claim of fairness calls upon her also to pay interest for the use of the money which she could not have known was not properly hers.

Such is this Court's doctrine regarding the imposition of interest in cases where this Court has fashioned its own doctrine. If it be said that the default of the United States should not be charged against its Indian wards, a choice has to be made between equally innocent victims of official neglect from 1918 until 1936 in the administration of the Indian law. The loss of interest to the United States because of the conduct of its officials in the *Sanborn* and *Billings* cases, *supra*, had to be borne by the innocent public. We think as to interest here, the loss should remain where it has fallen. If thereby Indians are out of pocket, they should not be made whole by putting Jackson County unfairly out of pocket. The appeal for relief must be made elsewhere.

The judgment below must accordingly be modified, and the case is remanded for further proceedings in accordance with this opinion.

It is so ordered.

Mr. Justice McREYNOLDS concurs in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 14.—October Term, 1939.

The Board of County Commissioners of the County of Jackson, in the State of Kansas, etc., Petitioner,
vs.
United States of America, etc.

On Writ of Certiorari to the Circuit Court of Appeals for the Tenth Circuit.

[December 18, 1939.]

Opinion of Mr. Justice Black.

Congress has traditionally treated the Indian wards of the Nation with particular solicitude,[1] but has also gradually evolved a policy looking to their eventual absorption into the general body of citizenry.[2] This policy has progressively subjected Indians to the laws under which all other citizens must live in the Indians' States of residence, if not in conflict with specific protective measures of Congress.[3] Here, in the exercise of its plenary authority, Congress by treaty exempted the lands of the Pottawatomies from taxation. It could have by stipulation granted the additional right to recover interest on any taxes collected in violation of the exemption; but it did not. The failure of Congress to stipulate that a State—as here—must pay interest to an Indian when the State law permits interest to no one,[4] is entirely consistent with the congressional policy of steadily extending the operation of the States' laws over their resident Indians. Congress—with exclusive plenary power to legislate concerning the Indians—has not provided for recovery of interest from Kansas, and the courts have no constitutional power to create the right.

[1] Lone Wolf *v.* Hitchcock, 187 U. S. 553, 564-6, 568; United States *v.* Pelican, 232 U. S. 442, 450.

[2] Chippewa Indians *v.* United States, 307 U. S. 1, 4; see Stuart *v.* United States, 18 Wall. 84, 87; Matter of Heff, 197 U. S. 488, 497-503; Lane *v.* Mickadiet, 241 U. S. 201, 210; Dickson *v.* Luck Land Co., 242 U. S. 371, 375; McCurdy *v.* United States, 246 U. S. 263, 269.

[3] See Matter of Heff, *supra;* La Motte *v.* United States, 254 U. S. 570, 579, 580; Spery Oil Co. *v.* Chisolm, 264 U. S. 488, 498; Larkin *v.* Paugh, 276 U. S. 431, 438-9; United States *v.* McGowan, 302 U. S. 535, 539.

[4] Jackson County *v.* Kaul, 77 Kan. 717.

That Congress contented itself with the creation of the right to be free from taxation—as distinguished from a right to interest in a suit for refund—is emphasized by the conclusion which would be inescapable were this a suit against the United States for violation of the exemption here conceded to be binding on it.[5] Without more,[6] Congress would then—even on the basis of this concession—be deemed to have refused to create the separate right to recover interest.[7]

Because the laws of Kansas deny interest on tax refunds, I concur in the modification of the judgment below.[8]

Mr. Justice DOUGLAS concurs in this opinion.

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[5] The Government bases its concession on Choate v. Trapp, 224 U. S. 665. But see The Cherokee Tobacco, 11 Wall. 616; Ward v. Race Horse, 163 U. S. 504, 511; Lone Wolf v. Hitchcock, *supra*, 566.

[6] Cf. 26 U. S. C. 1671(a).

[7] Angarica v. Bayard, 127 U. S. 251, 260; United States v. No. Amer. Co., 253 U. S. 330, 336; Smythe v. United States, 302 U. S. 329, 353. Cf. United States v. North Carolina, 136 U. S. 211.

[8] Cf. Erie R. Co. v. Tompkins, 304 U. S. 64.